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No.

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KOCH REFINING COMPANY, KOCH FUELS, INC.,
CONOCO INC., MOBIL OIL CORPORATION,
CHEVRON U.S.A. INC., and TENNECO OIL COMPANY,

Petitioners,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., FARMERS
PETROLEUM COOPERATIVE, INC., FCX, INC., LANDMARK,
INC., LAND O'LAKES, INC., MIDLAND COOPERATIVES,
INCORPORATED, MFA OIL COMPANY, TENNESSEE FARMERS
COOPERATIVE, MOORE McCORMACK PETROLEUM, INC.,
GULF STATES OIL & REFINING COMPANY, TEXACO INC.,
and GETTY REFINING AND MARKETING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

R.R. McMAHAN
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0328

*Counsel of Record
for Petitioners*

LOUIS W. LEVIT
RICHARD J. MASON
LEVIT AND MASON, LTD.
135 South LaSalle Street
Suite 1525
Chicago, Illinois 60603
Of Counsel

MICHAEL R. HASSAN
JONI L. GOLDSTEIN
TIMOTHY M. MAGGIO
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603
Of Counsel

QUESTIONS PRESENTED

1. Does the Bankruptcy Code authorize the trustee of a corporate debtor in bankruptcy to prosecute an action to pierce the corporate veil of the debtor?

2. If the Bankruptcy Code authorizes the trustee of a corporate debtor in bankruptcy to prosecute an action to pierce the corporate veil of the debtor, is the trustee's right to assert that claim exclusive?

3. Assuming the answer to Question Two is affirmative, does the Bankruptcy Code deprive Petitioners of due process of law guaranteed by the Fifth Amendment by forcing Petitioners to rely on the Trustee to prosecute a claim on their behalf that is unavoidably inconsistent with preference claims the Trustee is asserting against Petitioners?

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MIDLAND COOPERATIVES, INCORPORATED, MFA OIL
COMPANY, TENNESSEE FARMERS COOPERATIVE,
MOORE McCORMACK PETROLEUM, INC., GULF
STATES OIL & REFINING COMPANY, TEXACO INC.,
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FOR THE SEVENTH CIRCUIT**

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 831 F.2d 1339 (7th Cir. 1987) and is reproduced herein as Appendix A. The opinion and judgment of the United States District Court for the Northern District of Illinois, Eastern Division, are reported at 56 B.R. 242 (N.D. Ill. 1985) and are reproduced herein as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 7, 1987. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

11 U.S.C. §541 provides, in pertinent part:

§541. Property of the estate

(a) The commencement of a case under Section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * * * *

11 U.S.C. §544 provides:

§544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

- (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such judicial lien, whether or not such a creditor exists;
 - (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
 - (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.
- (b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. §704 provides in pertinent part:

§704. Duties of Trustee

The trustee shall—

- (1) collect and reduce to money the property of the estate for which such trustee serves, and close up such estate as expeditiously as is compatible with the best interests of parties in interest;

* * * * *

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

RULE 28.4(b) STATEMENT

Since the proceeding draws into question the constitutionality of Title 11 of the United States Code, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

In May 1981, Energy Cooperative, Inc. ("ECI") filed a voluntary petition under Chapter 11 of the Bankruptcy Code and subsequently brought suit as debtor in possession against the Petitioners under 11 U.S.C. §547 to recover approximately \$50 million in alleged preferences. Petitioners* are oil refiners, distributors and marketers who

* The listing required by this Court's Rule 28.1 is contained in Appendix C.

engaged in a series of transactions with ECI in which the parties exchanged refined petroleum products.

The defendants below are regional agricultural cooperatives that owned all of ECI's stock and selected its entire Board of Directors. They are hereinafter referred to as "Member-Owner Respondents". The Member-Owner Respondents organized ECI in 1976 to assure themselves and their own members of a steady supply of petroleum products for their agricultural businesses in light of the instability and shortages in the petroleum industry. The Member-Owner Respondents were ECI's principal customers.

In May 1984, ECI converted its Chapter 11 reorganization case to a Chapter 7 liquidation case. A Trustee was appointed and he is now pursuing the preference actions as well as an action against the Member-Owner Respondents.¹

In 1985, Petitioners filed the present action in the United States District Court for the Northern District of Illinois seeking a declaratory judgment that the Member-Owner Respondents operated ECI as their "alter ego"; that they

¹ In 1981, ECI filed an action for damages for breach of contract against the Member-Owner Respondents. In 1983, ECI filed an amended complaint alleging a cause of action for what it characterized as the Member-Owner Respondents' improper domination and control of ECI and improper use of ECI as their alter ego, agent and instrumentality. In 1985, the Trustee filed a second amended complaint against the Member-Owner Respondents for breach of contract, breach of fiduciary duties, "piercing the corporate veil," equitable subordination of the Member-Owner Respondents' claims, an equitable assignment and constructive trust, and for payment under promissory notes the Member-Owner Respondents gave ECI. Among other things, the Trustee seeks damages in an amount sufficient to pay and discharge all allowed claims against the ECI estate.

should be held jointly and severally liable for ECI's debts; and that ECI was solvent when it filed its bankruptcy petition. Jurisdiction was invoked under 28 U.S.C. §2201 and §1332. The Member-Owner Respondents moved to dismiss Petitioners' suit. The district court granted the motion, finding that Petitioners lacked standing to assert their claim because ECI's Trustee was the proper party to assert an "alter ego" action.²

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the district court. The Court found that creditors of a corporation have standing to assert an alter ego action and that upon the corporation's bankruptcy, the trustee succeeds to this right.³

² The lower courts have referred to the claim in this case as an "alter ego action." Actually, there is no such thing as an "alter ego action" at common law. See, e.g., *Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142, 1152 n. 11 (5th Cir. 1987). The doctrine "has been adopted by the courts in those cases where the idea of the corporate entity has been used as a subterfuge and to observe it would work an injustice." 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §41.10 (rev. perm. ed. 1983) (hereinafter "Fletcher").

³ The Court also found that Petitioners lacked standing to assert the "alter ego" claim because they were not faced with a "sufficiently immediate" threat of injury and because they could not trace any injury to the acts of the Member-Owner Respondents. One of the members of the court dissented from the Court's holding that the Petitioners lacked standing, correctly noting that Petitioners are being injured by being forced to defend the preference actions brought against them by the Trustee. (App. at A-32)

REASONS FOR GRANTING THE WRIT

I.

THE EXPANSIVE APPROACH TO INTERPRETATION OF A BANKRUPTCY TRUSTEE'S POWERS EMPLOYED BY THE COURT BELOW WAS DISAPPROVED BY THIS COURT IN *CAPLIN v. MARINE MIDLAND GRACE TRUST CO.*, 406 U.S. 416.

In *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), this Court concluded that a trustee in reorganization, armed not only with the powers of a trustee in liquidation but also with the powers of an equity receiver at common law, had no authority to assert claims against third parties on behalf of creditors. *A fortiori*, a simple trustee in liquidation (also referred to as a trustee in bankruptcy) cannot claim to have that authority.

In *Caplin*, a corporation had issued a series of debentures pursuant to an indenture agreement which appointed the Marine Midland Trust Company ("Marine") as indenture trustee. The corporation sustained a number of financial losses and, as a result, Marine, as indenture trustee, filed a petition seeking the corporation's involuntary bankruptcy. Caplin was appointed Trustee and conducted an investigation of the affairs of the debtor. Ultimately, he filed an action on behalf of the debenture holders to recover damages from Marine for failure to compel the corporation to comply with the terms of the indenture.

The district court dismissed the complaint, holding that the Trustee "had no standing . . . to raise claims of misconduct by an indenture trustee on behalf of debenture holders." *Id.* at 420. The Court of Appeals affirmed and the bankruptcy Trustee sought review in the Supreme Court.

On review, this Court held that because the claim being asserted was one which belonged to the debenture holders personally, it was not a cause of action that belonged to the bankruptcy estate. *Id.* at 429. Recognizing that the trustee cannot assert claims belonging to the estate's creditors without being specifically authorized to do so under the bankruptcy statute, this Court found that the bankruptcy statute did not specifically accord the trustee that right. *Id.* at 422. The Court found that "nowhere in the statutory scheme is there any suggestion that the trustee in [bankruptcy] is to assume the responsibility of suing third parties on behalf of debenture holders." *Id.* at 428.

Although *Caplin* was decided under the predecessor to the Bankruptcy Code, it accurately represents the state of the law regarding the statutory authority of a trustee in bankruptcy. Section 541 of the Bankruptcy Code, 11 U.S.C. §541, which defines property of the debtor estate, does not grant the trustee title to claims of creditors. No other section of the Code confers authority upon the trustee either to assert creditors' claims or to divest creditors of such claims.

Section 541 of the Bankruptcy Code, like its predecessor under the Bankruptcy Act, describes property of the estate as encompassing all legal and equitable interests "of the debtor" in property. This definition is broad enough to include any cause of action that the debtor corporation could itself have brought prior to bankruptcy. 4 W. Collier, *Bankruptcy* ¶ 541.10[1] (L. King 15th ed. 1987) (hereinafter "Collier"). Section 541 does not, however, encompass claims that can be brought only by the creditors of a corporation.

In this case, the claim the Trustee seeks to assert is not property of the debtor estate. It is a claim that can

be brought only by creditors or other third parties. As recognized by the Court below, an "alter ego" claim "may be asserted by any *creditor* without regard to the specific nature of his relationship with the corporation and its alleged alter ego." App. at A-13 (emphasis added). Because the "alter ego" claim could not have been brought by ECI against itself, it is not property "of the debtor" as required by Section 541.⁴

This result is compelled by the very nature of the alter ego doctrine, which prevents the principals of a corporation from hiding behind a shield of limited liability. See *Matter of Kaiser*, 791 F.2d 73, 75 (7th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 655 (1986). When a corporation is undercapitalized or a sham, equity will allow

⁴ Of course, Petitioners' declaratory judgment suit is not the type of claim that constitutes "property" of the estate under the Bankruptcy Code.

Section 704, which describes the duties of a trustee in bankruptcy, refers to "property of the estate" in terms of the trustee's obligation to marshal the assets of the estate for the *monetary* benefit of the estate's creditors.

Section 541, which defines "property of the estate," was designed to encompass the two actions that fell within Section 70a of the earlier Bankruptcy Act. Collier ¶ 541.10[1]. Section 70a(5), the first of those sections, defined property as any right of action which "could by any means have [been] transferred or which might have been levied upon and sold under judicial process." *Id.* Section 70a(6) defined property to include only those "rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property." *Id.* Section 541 thus defines property to include only things "of value" which can be distributed to creditors in satisfaction of the bankrupt's debts. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 175-76 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6136.

Neither §704 nor §541 was written to encompass actions like Petitioners' declaratory suit, where even a successful prosecution would not result in a money judgment.

creditors to “pierce the corporate veil” to reach the assets of the parties who are actually conducting the business of the putative corporation. The corporation is disregarded and creditors can look to the principals for satisfaction of their claims. *Matter of Kaiser, supra*, at 75.

It defies logic to characterize an “alter ego” action as property of a debtor corporation. If a bankrupt corporation were entitled to pierce its own corporate veil—whether on its own behalf or on behalf of its creditors—it would be admitting that it is a legal fiction which should be ignored for purposes of satisfying the claims of its creditors. Thus, a successful “alter ego” action would not increase the assets of the debtor corporation, but instead, would push that corporation aside and elevate the corporation’s creditors to the status of creditors of the principals.⁵ Creditors are not afforded more money, but simply are given presumably solvent parties to hold legally responsible for the corporation’s debts.

To construe the Bankruptcy Code as authorizing a trustee to prosecute an “alter ego” action would create a welter of confusion. For example, if a bankruptcy trustee is successful in piercing the veil of bankrupt estate, would the bankruptcy proceeding come to an end? Would the principals of the corporation be substituted for the corporation as bankrupts, or would the liquidation proceeding revert to a reorganization?

If the Trustee has authority to assert creditors’ claims, some section of the Bankruptcy Code other than Section

⁵ A successful “alter ego” action does not infuse the debtor corporation with all of the assets of its shareholders but fastens liability on the individuals who use a corporation merely as an instrumentality to conduct their own personal business. Fletcher §41.10.

541 must confer it. Yet the Court of Appeals recognized that nothing in the Bankruptcy Code's comprehensive statutory framework specifically accorded the Trustee that authority. The Court thus reached beyond the Bankruptcy Code to create additional powers never intended by Congress.

The Court of Appeals, relying on its earlier decision in *Matter of Kaiser, supra*, held that the Bankruptcy Code's so-called strong-arm provision, 11 U.S.C. §544, confers authority upon the Trustee to divest the Petitioners of their declaratory judgment action. That section, as presently written, cloaks the Trustee with the status of certain creditors favored under state law and accords the Trustee a super-creditor status enabling him to challenge the validity of transfers, liens, and encumbrances which are not subject to attack under other provisions of the Bankruptcy Code. Collier ¶ 544.01.

The Court of Appeals' expansive interpretation of Section 544 is indefensible. The legislative history of that Section makes clear that a trustee in bankruptcy has no power to assert creditors' claims against third parties.

In *Caplin*, after noting the absence of any such authority in the Bankruptcy Act, this Court stated:

"This does not mean that it would be unwise to confer such standing on trustees in . . . [bankruptcy]. It simply signifies that Congress has not yet indicated even a scintilla of an intention to do so, and that such a policy decision must be left to Congress and not to the judiciary."

Caplin, 416 U.S. at 434. Thus, the Court invited Congress to amend the law to specifically confer standing upon the trustee if Congress disagreed with *Caplin*.

The House of Representatives accepted this invitation and drafted a proposed amendment to Section 544 which

would have allowed a bankruptcy trustee to “enforce any cause of action that a creditor, a class of creditors, an equity security holder, or a class of equity security holders has against any person.” Proposed §544(c), H.R. 8200, 95th Cong., 1st Sess. 416-17 (1977).⁶

The legislative history of that amendment indicates that it was specifically intended to overrule *Caplin*. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 370-71 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6326-27. The proposed amendment was not, however, enacted into law. Instead, it perished in a conference committee. *Id.* at 6456.

The failure to enact proposed Section 544(c) is a clear congressional affirmation of *Caplin*:

“[B]ecause Congress refused to enact subsection (c), we believe Congress’ message is clear—no trustee, whether a reorganization trustee as in *Caplin* or a liquidation trustee as in the present case, has power under Section 544 of the Code to assert general causes of action, such as the alter ego claim, on behalf of the bankrupt estate’s creditors.”

In re Ozark Restaurant Equipment Co., Inc., 816 F.2d 1222, 1228 (8th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3244 (U.S. Oct. 6, 1987). As explained in *Ozark*, “[a]lthough Section 544 clarified and expanded the trustee’s role with respect to creditors, *in no way was it changed to authorize the trustee to bring suits on behalf of the estate’s creditors against third parties*. In fact, the legislative history suggests just the opposite.” *Id.* at 1227 (emphasis added). In

⁶ Even if proposed §544(c) had been adopted, by its express terms it would not have been broad enough to encompass the claims of *non-creditors* like Petitioners.

short, Congress' failure to amend the bankruptcy statute in light of *Caplin* reaffirms that bankruptcy trustees may not assert creditors' claims against third parties to the bankruptcy.

II.

A CONFLICT EXISTS AMONG THREE COURTS OF APPEALS CONCERNING A TRUSTEE'S AUTHORITY TO ASSERT AN "ALTER EGO" CLAIM.

The Courts of Appeals as well as lower federal courts speak with many voices when it comes to determining the proper party to assert an "alter ego" action in the context of a bankruptcy proceeding.⁷ The Court of Appeals for the Fifth Circuit, like the Court below, held that the trustee in bankruptcy is exclusively authorized to prosecute such a claim. *Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987) (hereinafter "*Acquisition*"). The Court of Appeals for the Eighth Circuit disagrees. It held that an "alter ego" claim belongs to creditors and remains with them throughout the bankruptcy proceeding. *In re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987) (hereinafter "*Ozark*"). In addition, although the Seventh and Fifth Circuits reached an identical result, they relied on fundamentally different grounds for their holdings. This conflict and confusion strongly counsels in favor of this Court granting a writ in order to provide guidance to the lower federal courts.

⁷ Compare *In re Western World Funding, Inc.*, 52 B.R. 743 (Bankr. D. Nev. 1985) (holding that the trustee has standing to assert an alter ego claim) with *In re Curtina International*, 15 B.R. 993 (Bankr. S.D.N.Y. 1981) (dismissing an action brought by creditors against principals of the debtor corporation because that action constituted a private controversy unrelated to the bankruptcy of the debtor).

In the present case, the Seventh Circuit found that the "alter ego" action belongs to creditors, not to the corporation, and therefore cannot constitute property of the debtor estate. Nevertheless, the Court concluded that the Trustee should be granted the exclusive authority to prosecute such a claim. The Court reasoned that such authority fell within the penumbra of the Trustee's obligation to represent (i.e., act in the best interest of) the creditors of the debtor estate.

In *Acquisition*, the bankruptcy court was asked to determine "whether the automatic stay provision of section 362 applied to bar further proceedings against nonbankrupt defendants in a state court action premised on piercing the corporate veil of the debtor." *Acquisition* at 1145. That court concluded that the stay should not apply. It reasoned that the automatic stay is intended to prevent dissipation of the assets only of the debtor estate. Therefore, "since the alter ego claim could not have been brought by the debtor or trustee, the court found that it was not property of . . . [the] bankruptcy estate." *Id.*

This judgment, affirmed on appeal to the district court, was reversed by the Court of Appeals for the Fifth Circuit. Unlike the Seventh Circuit in this case, the Fifth Circuit held that an "alter ego" action is property of the debtor estate and, as such, is protected by the automatic stay of Section 362. According to the Fifth Circuit, "a corporation may pierce its own corporate veil and hold accountable those who have misused the corporation in order to meet its corporate obligations." *Id.* at 1152.

The Fifth Circuit's decision represents a theoretical split with the Seventh Circuit in this case. The Fifth Circuit holds that an "alter ego" action is property of the debtor estate because, prior to bankruptcy, the corporation could itself have asserted that action as a matter of state law.

The Seventh Circuit, on the other hand, finds that an “alter ego” action is *not* property of the debtor estate by operation of state law and finds authority in the trustee to assert such a claim by virtue of the preemptive effect of the Bankruptcy Code.

Additionally, both the Fifth and Seventh Circuits are in conflict with the Court of Appeals for the Eighth Circuit, which in *Ozark* held that a bankruptcy trustee has no authority, penumbral or otherwise, to prosecute an “alter ego” claim. In *Ozark*, the trustee of a bankrupt corporation filed suit against the corporation’s two shareholders. “The trustee alleged, *inter alia*, that because of the defendant-principals’ abuses of the corporation, the corporate veil should be pierced and the individuals should be held personally liable for . . . [the corporation’s] debts.” *Ozark*, 816 F.2d at 1223. The district court, relying on this Court’s *Caplin* decision, dismissed the Trustee’s complaint for lack of standing. The Court of Appeals affirmed.

The Eighth Circuit first analyzed the “alter ego” action under Section 541 to determine whether it constituted property of the debtor estate. Like the Seventh Circuit, the *Ozark* Court recognized that the debtor corporation could not have brought such an action against itself prior to bankruptcy. The Court explained that because “the nature of the alter ego theory of piercing the corporate veil makes it one personal to the corporate creditors rather than the corporation itself, it is axiomatic that the claim does not become property of the estate under Section 541(a)(1), nor is it enforceable by the trustee under Section 704(1).” *Ozark, supra*, at 1225.

The Court then considered whether a trustee has the authority to assert such a claim pursuant to the strong-arm authority of Section 544. Recognizing that the text of Section 544 does not specifically grant such authority,

the Eighth Circuit looked to *Caplin* for guidance, and correctly interpreted *Caplin* as foreclosing a bankruptcy trustee from asserting creditors' claims against third parties under the Bankruptcy Act. Because the Bankruptcy Code did not materially expand the role of trustees vis-a-vis creditors, and because Congress decided not to overrule *Caplin*, the *Ozark* Court held that the Bankruptcy Code conferred no penumbral authority upon the trustee to assert claims of creditors.

III.

IF THE BANKRUPTCY CODE PERMITS THE RESULT REACHED BY THE COURT OF APPEALS IN THIS CASE, IT DEPRIVES PETITIONERS OF DUE PROCESS OF LAW.

The Seventh Circuit's interpretation of the Bankruptcy Code deprives Petitioners of their right to pursue a declaratory judgment action against the Member-Owner Respondents. That action, if carried to a successful conclusion, would effectively terminate the Trustee's preference actions against Petitioners and thereby eliminate their potential loss of as much as \$50 million in allegedly preferential transfers. If the Seventh Circuit's interpretation is correct, the Bankruptcy Code works an unconstitutional deprivation of Petitioners' due process rights. As stated by this Court in *Hansberry v. Lee*, 311 U.S. 32, 45 (1940), "[A] selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."

Petitioners' due process rights cannot be adequately represented by the Trustee in this case.⁸ Unlike a representative who has been selected by Petitioners, the Trustee's interests are in direct conflict with Petitioners'. The Petitioners' alter ego action is intended to establish that ECI was solvent at the time of the allegedly preferential transfers. If the Trustee were to adequately represent Petitioners in an alter ego action, he would be required to vigorously gather evidence and present arguments establishing ECI's *solvency*. At the same time, however, the Trustee would still be obligated to pursue his preference actions against Petitioners. As an essential element of those actions, the Trustee will be required to prove that ECI was *insolvent* at the time of the allegedly preferential transfers.⁹

If this result is intended by §541 or §544 of the Bankruptcy Code, those provisions are unconstitutional because they deprive Petitioners of the most fundamental guarantees of due process.

⁸ Even if the trustee arguably can adequately represent the *creditors* of ECI's estate in marshalling ECI's assets for distribution to creditors, none of the Petitioners seeks review as a creditor. Petitioners will become creditors if the Trustee is successful in the preference litigation.

⁹ Section 547(b)(3) of the Bankruptcy Code provides that the transferor (here ECI) must have been "insolvent" at the time of an allegedly preferential transfer in order for the trustee to recover the transfer.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to the Court of Appeals for the Seventh Circuit to review its judgment herein.

Respectfully submitted,

R.R. McMAHAN
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0328

*Counsel of Record
for Petitioners*

**LOUIS W. LEVIT
RICHARD J. MASON
LEVIT AND MASON, LTD.**
135 South LaSalle Street
Suite 1525
Chicago, Illinois 60603

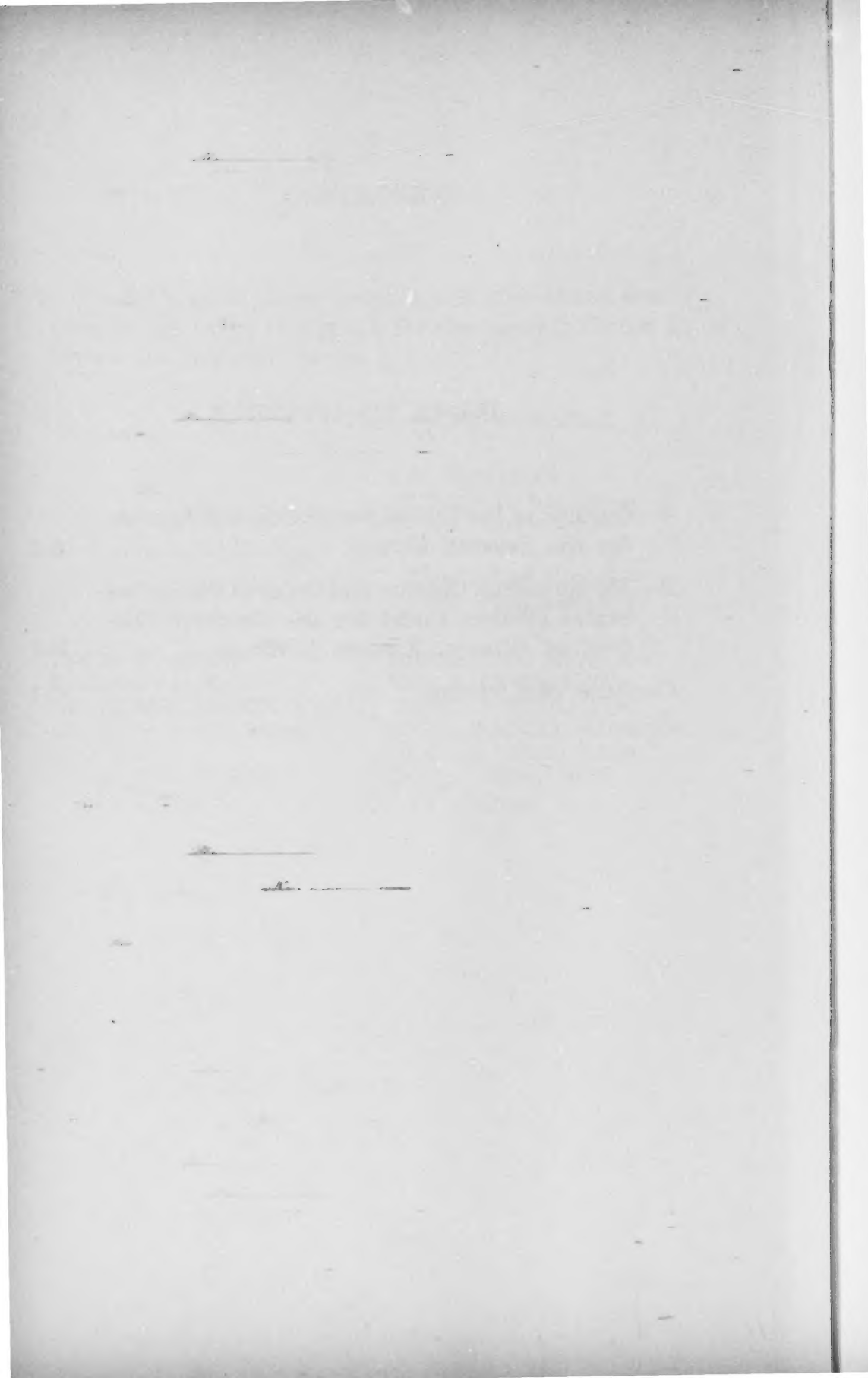
Of Counsel

**MICHAEL R. HASSAN
JONI L. GOLDSTEIN
TIMOTHY M. MAGGIO
LORD, BISSELL & BROOK**
115 South LaSalle Street
Chicago, Illinois 60603

Of Counsel

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 86-1102

KOCH REFINING, KOCH FUELS, CONOCO, INC., MOBIL OIL CORPORATION, CHEVRON U.S.A. INC., TOSCO CORPORATION, TENNECO OIL COMPANY, MOORE-McCORMICK PETROLEUM, GULF STATES OIL & REFINING, TEXACO INC., and GETTY REFINING AND MARKETING COMPANY,

Plaintiffs-Appellants,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., FARMERS PETROLEUM COOPERATIVE, INC., FCX, INC., LANDMARK, INC., LAND O'LAKES, INC., MIDLAND COOPERATIVES, INCORPORATED, MFA OIL COMPANY, and TENNESSEE FARMERS COOPERATIVE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 06745—Charles P. Kocoras, Judge.

ARGUED SEPTEMBER 11, 1986—DECIDED OCTOBER 7, 1987

Before CUDAHY and COFFEY, *Circuit Judges*, and GRANT,
Senior District Judge.*

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

GRANT, *Senior District Judge*. This case comes to us on appeal from the district court's dismissal of a declaratory action brought by eleven petroleum corporations (oil companies). The oil companies, appellants herein, had regularly exchanged petroleum products with Energy Cooperative, Inc. (ECI), an Indiana oil refinery now in bankruptcy. In their complaint they sought a declaration that, *inter alia*, the Member-Owners of ECI were the alter ego of ECI. The district court dismissed the oil companies' suit for lack of standing. For the reasons set forth below, we affirm that holding.

I.

The Member-Owners, appellees in this case, are regional agricultural cooperatives that formed ECI in 1976 to insure a steady supply of petroleum products for their agricultural businesses in a period of instability and shortages in the petroleum industry. They own 100% of ECI's stock, comprise 100% of its board of directors, and are ECI's principal customers. The oil companies appealing herein provided ECI with petroleum products for its own use and for delivery to other customers when needed elsewhere.

On May 15, 1981, ECI filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Although neither the debtor nor the trustee in bankruptcy is a party to the present action, this case grew out of the bankruptcy of ECI.

In October 1981, ECI as debtor-in-possession brought separate actions against the oil companies to recover alleged preferences under Section 547 of the Bankruptcy Code. Those adversary proceedings contended that ECI made transfers of products and proceeds within the preferential ninety-day period prior to its filing of the bankruptcy petition, and that the trustee could thus recover nearly \$50 million in value allegedly received by the oil companies during that period. ECI also sued the Member-Owners in an attempt to hold them liable for all of ECI's debts.

In that litigation ECI alleged, *inter alia*, that the Member-Owners breached certain contracts with ECI; that they breached their fiduciary duties by preventing ECI from remedying the breaches of contract and by causing ECI to take other actions contrary to its best interests; and that the Member-Owners should be liable for all of ECI's debts as its "alter ego" under a "piercing the corporate veil" theory.

On May 31, 1984, ECI converted its Chapter 11 reorganization case to a Chapter 7 liquidation case. A trustee was appointed; he is pursuing each of these lawsuits in bankruptcy.¹

On July 29, 1985, the oil companies filed this action in district court, seeking a declaratory judgment that ECI is the alter ego of the Member-Owners; that the Member-Owners are jointly and severally liable for ECI's debts; that ECI was solvent when it filed its bankruptcy petitions; and that the oil companies are entitled to recover from the Member-Owners all amounts that the bankruptcy trustee may recover from the oil companies as preferences. The Member-Owners filed motion to dismiss the complaint.

On December 23, 1985, the district court dismissed the oil companies' complaint against the Member-Owners. *Koch Refining, et al. v. Farmers Union Central Exchange, Inc.*, No. 85 C 6745 (N.D. Ill., Dec. 23, 1985). Basing its opinion upon a prudential aspect of standing, the court deter-

¹ In prior litigation in the district court, the debtor and intervening plaintiffs representing unsecured creditors in the ECI bankruptcy sought, by joint motion, a determination of the proper party to bring an alter ego action against the Member-Owners. *In re Energy Co-op, Inc.*, 58 B.R. 132 (N.D. Ill. 1984). The court determined that the trustee had standing to represent all creditors for the purpose of asserting state law causes of action against directors and stockholders. *Id.* at 134, 135. The trustee was also found to be the proper party to bring suit against the Member-Owners "to insure adherence to the pervasive Bankruptcy Code policy of equality of distribution among creditors." *Id.* at 136.

mined that the oil companies were not the proper proponents of the legal rights they asserted in their complaint. Order at 4 (citing *Singleton v. Wulff*, 428 U.S. 106, 112 (1976)). We concur in that determination, and further find that appellants lack standing because they have not shown a substantial controversy between parties in a classically adverse relationship, *id.* at 113, of sufficient reality to warrant declaratory relief. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

II.

The district court found that the oil companies had raised essentially the same allegations as those made by the ECI trustee in bankruptcy proceedings. Order at 2. After reviewing the relationship among the oil companies, the debtor corporation and the Member-Owners, the court determined that the oil companies' status as "creditor or potential creditor" was not sufficient for standing. Order at 3. In addition to showing actual or threatened injury, stated the district court, the claimants must be the proper parties to bring a particular action. Order at 3-4.

To determine which party properly could assert this action, the court recognized first the right of a corporation to seek damages from its fiduciaries for mismanagement, misappropriation of assets, or breach of duty, and then the passing of that right to the corporation's trustee in bankruptcy.² Order at 4. Since the oil companies were not

² This case is essentially a dispute between the ECI bankruptcy trustee, whose rights are being asserted by the Member-Owners, and the oil companies to gain title to the Member-Owners' assets. The difference in the result of this dispute is noteworthy. If the oil companies prevail both in their suit to remove this standing limitation and in their declaratory action, then under the terms of the complaint they will "recover from the Member-Owners all amounts that the trustee may recover from [them]." That is, if the trustee recovers the \$50 million in preferential transfers, the oil companies are protected in full. On the other hand, if the

(Footnote continued on following page)

the proper parties to recover damages from the Member-Owners, who are the fiduciaries of ECI, the court held that they lacked standing to obtain declaratory relief. *Id.*

In this appeal the oil companies assert that they satisfy the constitutional requirements for standing because they are confronted with an actual threat of injury in the trustee's preference litigation against them, an injury that is likely to be redressed by a favorable decision here. They further allege that they, and not the trustee, are the proper parties to bring an alter ego action: Since that cause of action is neither property of the estate under 11 U.S.C. § 541 nor an action encompassed by 11 U.S.C. § 544 that would allow the trustee to act on behalf of creditors, the trustee does not have standing to raise it.

Article III of the United States Constitution requires that the party seeking judicial resolution of a case or controversy have standing to present his claim. The standing requirement focuses on the party bringing the claim. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Central to that requirement as well is the injury of the litigant bringing the action. *Diamond v. Charles*, ____ U.S. ____, 106 S.Ct. 1697, 1703 (1986). At an "irreducible minimum," the plaintiff must show that:

- (1) the party "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979)); (2) the injury "fairly can be traced to the challenged action," of the

² *continued*

trustee is found to have standing and he succeeds in his alter ego action, the Member-Owners will be liable for ECI's debts in the bankruptcy. Their assets will become assets of ECI's estate for *pro rata* distribution to all creditors. If the oil companies are, at that point, creditors of ECI, they will probably receive only a portion of the amounts they turned over to the estate as preferential transfers.

defendants (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976)); and (3) the injury "is likely to be redressed by a favorable decision," (quoting *Simon*, 426 U.S. at 38, 96 S.Ct. at 1925).

Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371, 381 (7th Cir. 1986) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

These requirements are imposed equally upon a party bringing an action for declaratory judgment as upon one seeking damages or coercive relief. As we have recently stated, in order to demonstrate standing for a declaratory judgment, a party must show "that she has sustained, or is in immediate danger of sustaining, a direct injury as a result of the defendants' conduct." *Foster v. Center Township of LaPorte County*, 798 F.2d 237, 242 (7th Cir. 1986).

The district court's holding that the oil companies lack standing is based primarily upon its determination that a bankruptcy trustee is the successor to a corporation's right to assert a cause of action against fiduciaries for neglect of duty to the corporation. The oil companies insist, however, that a trustee is not the proper party to bring an alter ego action. The arguments presented in the briefs and at oral argument centered primarily upon the trustee's lack of standing rather than upon the oil companies' right to standing. In recognition of the integral relationship of the bankruptcy trustee to the parties herein, we must first consider the role of a bankruptcy trustee and his right to assert an alter ego claim.

III.

A.

A person who meets the eligibility requirements of 11 U.S.C. § 321 of the Bankruptcy Code and various related bankruptcy rules may be appointed a bankruptcy trustee

by the court. The role of trustee³ as a representative of the estate, with the capacity to sue and be sued, is defined in section 323 of the Bankruptcy Code. The Code explicitly grants broad responsibilities to the trustee in collecting the debtor's assets and dealing with the bankruptcy estate. *See, e.g.*, 11 U.S.C. §§ 704, 721, 724, 725, 363, 364, 365. The trustee of a Chapter 7 debtor (to which ECI has converted) has the general duties of marshalling all available property, reducing it to money, distributing it to creditors, and closing up the estate. 11 U.S.C. § 704(1).

The trustee represents not only the rights of the debtor but also the interests of creditors of the debtor. Pursuant to 11 U.S.C. § 544 the trustee, in his capacity as a creditor, may bring suit to reach property or choses in action belonging to the estate that will then be distributed to all creditors. The trustee's single effort eliminates the many wasteful and competitive suits of individual creditors. However, his actions as creditor representative may be resented, and the trustee may have to respond to attacks by individual creditors. *See 1 Cowans, Bankruptcy Law and Practice* § 2.7 at 72 (1986 Ed.). This difficult aspect of representing self-interested creditors has been long recognized. "[H]istorically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another." *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945).

Whether the trustee is representing the estate or "standing in the shoes" of the creditors, he has the duty to marshal the debtor's property for the benefit of the estate, and thus the right to sue parties for recovery of all property available under state law. He then distributes the

³ The authority granted to a debtor-in-possession supervising a Chapter 11 case is virtually identical to that granted to a trustee; what differences there are do not affect this case. *See* 11 U.S.C. § 1107. Thus, our discussion of a trustee's powers is applicable to the role of a debtor-in-possession.

amounts collected on a *pro rata* basis to all creditors in accord with the bankruptcy provisions and theme of "equality of distribution." *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941).

B.

Section 541 of the Bankruptcy Code, which creates the bankruptcy estate, offers an expansive definition of property comprising the estate: Whatever "legal and equitable interests" the debtor had in property as of the filing of the bankruptcy petition is property of the bankruptcy estate. The debtor's interest in property is determined by nonbankruptcy law, but the determination of what constitutes section 541 property is a federal question. H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978). Once the bankruptcy petition has been filed, property rights belonging to a debtor under state law become assets of the estate. *Butner v. United States*, 440 U.S. 48, 54 (1979); *Matter of Kaiser*, 791 F.2d 73, 74 (7th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 655 (1986).

Courts have regularly applied section 541 broadly to include property fraudulently or improperly transferred by the debtor before bankruptcy. *Sampsell*, 313 U.S. at 221; *Carlton v. BAWW, Inc.*, 751 F.2d 781, 785 (5th Cir. 1985); *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275 (5th Cir. 1983); *In re Mishkin*, 58 B.R. 880, 882 (Bankr. S.D. N.Y. 1986). Creditors' fraud claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) have been found to be section 541 property assertable only by the trustee. *Dana Molded Products, Inc. v. Brodner*, 58 B.R. 576, 578 (N.D. Ill. 1986). See *Warren v. Manufacturers National Bank of Detroit*, 759 F.2d 542, 545 (6th Cir. 1985). And a creditor's action for fraudulent creation of a new entity for debt-avoidance purposes has been properly asserted by the bankruptcy trustee. *Lumbard v. Maglia, Inc.*, 621 F. Supp. 1529, 1536, 1541 (S.D.N.Y. 1985).

It has also long been held that rights of action against officers, directors and shareholders of a corporation for breaches of fiduciary duties, which can be enforced by either the corporation directly or the shareholders derivatively before bankruptcy, become property of the estate which the trustee alone has the right to pursue after the filing of a bankruptcy petition. *Pepper v. Litton*, 308 U.S. 295, 306-07 (1939); *Mitchell Excavators by Mitchell v. Mitchell*, 734 F.2d 129, 131 (2d Cir. 1984); *Bayliss v. Rood*, 424 F.2d 142, 146 (4th Cir. 1970).⁴ The section 541 estate has been found to include any actions that a debtor corporation may have to recover damages for fiduciary misconduct, mismanagement or neglect of duty, and the bankruptcy trustee succeeds to that right for the benefit of all creditors of the estate. *Delgado Oil Co., Inc. v. Torres*, 785 F.2d 857, 860 (10th Cir. 1986).

A thorough study of the broad parameters of section 541 property was presented by the Fifth Circuit Court of Appeals in *In re MortgageAmerica Corp.*, 714 F.2d 1266 (5th Cir. 1983). In that case, a creditor brought suit against the individual controlling an insolvent corporation by asserting three state law claims based upon fraudulent conveyances. The Fifth Circuit found that the claims asserted by the creditor actually belonged to the debtor corporation and were assertable only by the trustee. *Id.* at 1275. The court recognized the breadth of "property of the estate" and relied upon the fundamental bankruptcy policy of equitable distribution to all creditors that should not be undermined by an individual creditor's claim. *Id.* at 1276.

⁴ See also *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1093 (1st Cir. 1983), *cert. denied*, 464 U.S. 961 (1983), which applied the alter ego doctrine to hold solvent members of a corporate group responsible for the liability of the insolvent corporate member. Liability was found under the ERISA statute and under the bankruptcy court's equitable powers to consolidate assets and liabilities of various interrelated business entities to protect creditors and to achieve reorganization.

An alter ego claim also frequently involves improper or fraudulent actions by fiduciaries of a corporation. However, appellants assert that such an action cannot be considered section 541 property of the corporation's bankruptcy estate, for it can be brought only by those injured by the misuse of the entity's corporate form. To determine the validity of this allegation, we must examine the theory of alter ego and its definition under state law.

The alter ego doctrine is used in certain situations to displace the basic principle of the law of corporations that a corporation and its shareholders are separate legal entities with limited liabilities. When certain state-governed requirements are met, the alter ego theory allows the legal distinction between a corporation and its shareholders, directors and officers to be disregarded or set aside in order to reach the assets of those individuals "behind the corporation." The general reason for allowing the corporation's "veil to be pierced," for recognizing that the corporation is a "fictitious entity" which is simply a business conduit of another entity, and for holding its shareholders personally liable is usually an equitable one: There is a need to secure a just determination. See 18 Am.Jur.2d *Corporations* §§ 45, 46, 50, 51, 52 (1986); 3 *Cowans* § 16.7.

This court has recently examined the alter ego doctrine in *Matter of Kaiser*, 791 F.2d 73 (7th Cir. 1986) (Posner, J.).⁵ In that decision, we acknowledged the principle of separate corporate identity, the value of limited liability to our capitalist system, but also the need to extinguish

⁵ Compare Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U.Chic.L.R. 499, 520-21 (1976). There is a lively debate in the University of Chicago Law Review between Judge Posner and Professor Jonathan M. Landers in this area. See Landers' two articles, *A Unified Approach to Parent, Subsidiary & Affiliate Questions in Bankruptcy*, 42 U.Chic.L.R. 589 (1975) and *Another Word on Parents, Subsidiaries & Affiliates in Bankruptcy*, 43 U.Chic.L.R. 527 (1976). See also Easterbrook and Fischel, *Limited Liability and the Corporation*, 52 U.Chic.L.R. 89 (1985).

the legal separateness of the corporation from its individual members or shareholders whenever limited liability would "defeat some strong equitable claim." *Id.* at 75. *Kaiser* recognized that, under Wisconsin law, "creditors could have pierced the [debtor's] veil under a misrepresentation rationale, and the trustee stands in their shoes." *Id.* at 76. See also *In re K & L Ltd.*, 741 F.2d 1023 (7th Cir. 1984); *Matter of Palmer Trading Post*, 695 F.2d 1012 (7th Cir. 1982).⁶

State law determines whether property is an asset of the debtor. *In re Brass Kettle Restaurant, Inc.*, 790 F.2d 574, 575 (7th Cir. 1986). To determine whether this alter ego action is property of the debtor or of the appellants, therefore, we must turn to the law of the state in which legal or equitable title to the cause of action is asserted. However, neither the parties' briefs nor the record of this case identified the controlling state. Since it could be Indiana (the location of the debtor ECI) or Illinois (the venue of this cause and of the bankruptcy proceedings), we will examine the laws of each state. *Matter of Kaiser*, 791 F.2d at 74; *In re K & L Ltd.*, 741 F.2d at 1030 n.7.

In Indiana, the corporate veil will be pierced "where one corporation is so organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation." *Extra Energy Coal Co. v. Diamond Energy and Resources, Inc.*, 467 N.E.2d 439, 441 (Ind. Ct. App. 1984). Nevertheless, Indiana courts will disregard corporate identity "only to protect innocent third parties from fraud or injustice when transacting business with a corporate entity." *Id.* at 441-42. Evidence

⁶ Although *In re Palmer Trading, Inc.* found that the bankruptcy court did not present legally sufficient findings of alter ego, it did not challenge the trustee's right to assert the alter ego claim. *Palmer Trading* was criticized for its reliance on a Seventh Circuit alter ego test, rather than on a state law definition of the doctrine, in *Van Dorn Co. v. Future Chemical and Oil Corp.*, 753 F.2d 565, 570-71 (7th Cir. 1985) and was limited to its facts in *Matter of Kaiser*, 791 F.2d 73, 76 (7th Cir. 1986).

indicative of an alter ego relationship includes misrepresentation, agency relationship, or intermingling of corporate identities or funds. *Id.* at 442.

Recognizing that "there is no one talismanic factor that a court can find to exist which will with impunity justify it in piercing the corporate veil," Indiana courts carefully review "the entire relationship between parent and subsidiary" to determine whether the corporate entity should be disregarded. *Burger Man, Inc. v. Jordan Paper Products, Inc.*, 170 Ind. App. 295, 352 N.E.2d 821, 834 (1976).

The law of Illinois is quite similar. It requires two traditional factors to be shown before a corporate veil can be pierced:

first, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and second, circumstances must be such that an adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.

Gallagher v. Reconco Builders, Inc., 91 Ill. App. 3d 999, 1004, 415 N.E.2d 560, 563-64 (1980). This court has recently analyzed the Illinois alter ego test and has recognized that the second element requires "either the sanctioning of a fraud (intentional wrongdoing) or the promotion of injustice." *Van Dorn Co. v. Future Chemical and Oil Corp.*, 753 F.2d 565, 570 (7th Cir. 1985).

The degree of control one entity holds over another has been measured in Illinois by evidence of misrepresentation; commingling of funds, assets, or identities; undercapitalization; failure to operate at arm's length; and failure to comply with corporate formalities. *Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 427 N.E.2d 94, 102 (1981).

Because disregard of the corporate entity is essentially an equitable doctrine, application of the theory will depend upon the circumstances in each case. *Stap v. Chicago Aces Tennis Team, Inc.*, 63 Ill. App. 3d 23, 379 N.E.2d 1298, 1302 (1978).

In each state, the alter ego relationship is a question of fact to be determined by the circumstances of each case. *See also Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). In each state, either the sanctioning of fraud or the promotion of injustice is one criterion. The other criterion is virtually the same: In Indiana, one corporation must be a "mere instrumentality or adjunct of another;" in Illinois, the "interest and ownership" of the two entities are so united that "separate personalities . . . no longer exist."

Both states use similar factors in determining whether to disregard the corporate entity. Despite certain differences in the factors required, "[w]hat the formula comes down to, once shorn of verbiage about control, instrumentality, agency and corporate entity, is that liability is imposed to reach an equitable result." *Brunswick Corp. v. Waxman*, 599 F.2d 34, 36 (2d Cir. 1979). Neither state has suggested that specific parties have standing to make the allegations of alter ego and to present evidence which might establish such a relationship. In each state, the alter ego theory is an equitable, remedial doctrine that may be asserted by any creditor without regard to the specific nature of his relationship with the corporation and its alleged alter ego. *See In re Western World Funding, Inc.*, 52 B.R. 743, 775 (Bankr. D. Nev. 1985).

This court previously recognized the bankruptcy trustee, representing creditors, as the proper party to bring an alter ego claim under Wisconsin law. *Matter of Kaiser*, 791 F.2d at 76. We now find that, under Illinois and Indiana law as well, a bankruptcy trustee can bring an alter ego claim of action.⁷ State law permits the alter ego claim

⁷ It is not within the scope of this appeal to determine in which capacity the ECI trustee may assert an alter ego cause of action. An alter ego claim depends upon the circumstances of the case; therefore, the posture of the trustee may be determined by the facts. We have held only that a bankruptcy trustee is not precluded from maintaining an alter ego action under Indiana and Illinois law.

to be asserted by the trustee in pursuing all funds available as section 541 property of the estate. And federal bankruptcy law permits the trustee to recover property on behalf of all creditors for equitable distribution. Furthermore, this logical procedure obviates multiple liability of the debtor to separate creditors and accords with the Bankruptcy Code's ultimate goal of balancing the equities and interests of all affected parties in a bankruptcy case.

C.

Appellants have offered three cases to support their assertion that a corporation does not pierce its own veil, and that a corporation's trustee therefore cannot bring an alter ego cause of action. They first rely upon a New York bankruptcy case, *In re Curtina International*, 15 B.R. 993 (Bankr. S.D.N.Y. 1981). In *Curtina*, the bankruptcy court held that it did not have jurisdiction over a creditor's alter ego claim against two corporate officers because that action "does not relate to or affect the administration of this bankruptcy case and is merely a private controversy exclusively between third parties in which the trustee asserts no interest." *Id.* at 996.

Like the creditor in *Curtina*, the oil companies insist that they can pierce the corporate veil of the debtor in this private nonbankruptcy controversy because they seek to recover assets "neither . . . for the estate nor from the estate."⁸ *Id.* at 995.

⁸ Appellants have assured the court that they seek only declaratory relief, not the recovery of estate assets or money damages, and thus will not interfere in the ECI bankruptcy proceeding. However, they have also stated that the granting of this declaratory action would result in collaterally estopping the Member-Owners from denying their liability to the bankruptcy estate, and in the oil companies' recoupment of any funds brought into the estate as preferential transfers. Certainly such results would impinge significantly on the underlying bankruptcy.

However, *Curtina* differs significantly in its facts from the case herein. In *Curtina*, both trustee and creditor sought to attach the property of individual principals of the debtor corporation, but they resorted to different causes of action. The trustee's adversary proceeding was based upon allegations of fraudulent conveyances of the debtor's property; the creditor's claim was founded upon an alter ego theory. The trustee neither challenged the creditor's right to recover from the debtor's fiduciaries nor asserted any interest in the creditor's recovery.

It has long been established that a trustee has the authority to prosecute or to decline to bring an action on behalf of the estate. Bankruptcy Rule 6009. The trustee may abandon an action to a third party, and that party may then pursue it.⁹ However, if the claim is not abandoned by the trustee and a third party attempts to prosecute, such law suits have usually been dismissed.¹⁰ *Matter*

⁹ If the trustee chooses not to prosecute an action on behalf of the estate, the cause of action reverts in the debtor, who can then assert title. *Stein v. United Artists Corp.*, 691 F.2d 885, 890-91 (9th Cir. 1982); *Management Investors v. United Mine Workers of America*, 610 F.2d 384, 392 (6th Cir. 1979). Only after the trustee and the debtor decline to bring the action may it be maintained by an individual creditor. *Ford Motor Credit Co. v. Minges*, 473 F.2d 918, 921 (4th Cir. 1973). If a stockholder or creditor wishes to institute a suit that the trustee has failed to bring, he must first ask the trustee to abandon the suit and then present the question to the court, asking leave to prosecute the action for and in the name of the trustee. *Management Investors*, 610 F.2d at 393. See also 3A *Fletcher Cyc Corp* § 1277.1 (1986). Any party may petition the bankruptcy court to compel the trustee either to bring suit or to abandon the claim. *Dallas Cabana, Inc. v. Hyatt Corp.*, 441 F.2d 865, 868 (5th Cir. 1971). Furthermore, the bankruptcy court may decide that a claim should be abandoned and may order the trustee to abandon it. *In re Ira Haupt & Co.*, 398 F.2d 607, 612 (2d Cir. 1986).

¹⁰ Compare *In re American Hawk Enterprises, Ltd.*, 52 B.R. 395 (E.D. Va. 1985), which barred a creditor's attempt to pierce the veil of the debtor corporation because the creditor's claims were nearly identical to the trustee's assertions and were not abandoned by the trustee, but rather were settled and released. *Id.* at 399.

of *Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1253-54 (5th Cir. 1986); *Mitchell Excavators by Mitchell v. Mitchell*, 734 F.2d at 132.

The *Curtina* trustee chose not to assert an alter ego claim and determined that the creditor's pursuit of his action was a private controversy in which he had no interest. *Curtina* does not hold that a trustee lacks standing to assert an alter ego claim, nor that an alter ego claim cannot be property of an insolvent corporation's estate.

The oil companies have also cited *Stodd v. Goldberger*, 73 Cal. App. 3d 827, 141 Cal. Rptr. 67 (1977) for the proposition that the trustee has no standing to assert an alter ego claim against the debtor's principals because such claims belong to the creditors. However, the California court's decision is much narrower, and in fact assumes the trustee's right to standing *unless* he fails to assert injury to the corporation.

Plaintiff, as trustee in bankruptcy of a bankrupt corporation, cannot maintain an action against defendants on an alter ego theory *absent some allegation of injury to the corporation giving rise to a right of action in it against defendants*. In the absence of any such allegations, the asserted cause of action belongs to each creditor individually.

Stodd, 73 Cal. App. 3d at 833 (emphasis added).

A fairer rephrasing of the *Stodd* ruling is that, if a trustee of a bankrupt corporation has an interest in recovering from nondebtor fiduciaries on an alter ego theory, he must allege injury to the corporation giving rise to a right of action in alter ego against the fiduciaries.

The last case upon which appellants rely is an unreported opinion of the Tennessee Court of Appeals, *Brown v. Vencap Investment Corporation and Morton Kent*, Docket No. 556 (Hamilton Law), (Tenn. Ct. App. Mar. 31, 1984). In this case, the trustee's complaint, brought on behalf of both the debtor corporations and the creditors, contained allegations of mismanagement, alter ego and

breach of fiduciary duty. At trial, a jury found for the trustee and assessed both compensatory and punitive damages against Vencap and its president, Morton Kent. Slip op. 11, 14.

On appeal, the court considered the issue to be the trustee's standing to maintain actions specifically on behalf of the debtor corporations *or* on behalf of the creditors. It allowed the trustee to bring suit alleging breaches of fiduciary duty on behalf of the debtors, since causes of action against fiduciaries are held by the corporation and can be asserted by a corporation's trustee. Slip op. 11, 31. But it rejected the trustee's right to bring the claim on behalf of the creditors, for creditors lack privity to sue fiduciaries. *See* slip op. 11, 29-31.

According to the Tennessee court, the majority rule seemed to be that an alter ego action vested in the individual creditors; therefore it addressed the trustee's standing to bring an action only on behalf of creditors. Slip op. 11, 14. Relying on pre-Bankruptcy Code case law and on Vencap's proffered interpretation of the legislative history,¹¹ it concluded that a trustee lacks standing to assert

¹¹ In its revamping of the Bankruptcy Act to create the 1978 Bankruptcy Code, the House of Representatives Committee of the Judiciary included a subparagraph to section 544 that would allow the trustee to enforce a claim that any individual creditor or class of creditors has against a third party. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 370-71 (1977). It was added in direct response to the Supreme Court's urging in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972) that Congress make a policy decision concerning the standing of trustees in bankruptcy reorganizations to bring suits against indenture trustees on behalf of debenture holders. *Id.* at 434-35. (In *Caplin*, the Supreme Court found that a Chapter X trustee was precluded from enforcing such a claim on behalf of debenture holders. *Id.* at 434.) However, the Senate's version of the bankruptcy bill deleted that subsection without explanation, and the final version did not contain it. The Tennessee Court of Appeals adopted Vencap's interpretation that this omission was a decision to deny a trustee standing to bring an action on behalf of creditors. Actually, though, the deletion of

(Footnote continued on following page)

claims on behalf of creditors against third parties. Slip op. 11, 26-28.

The state court considered the different postures of various creditors of the bankrupt corporations in light of the state alter ego rule. It pointed out that one creditor in

¹¹ *continued*

that subparagraph means only that *Caplin* is not overruled and that there is no express statutory provision allowing a trustee to bring an action which *certain* creditors, like debenture holders, have. The omission does not affect a trustee's right to bring a general action on behalf of all creditors rather than a personal one on behalf of only some. See *Lumbard v. Maglia, Inc.*, 621 F. Supp. at 1542. Two recent appellate opinions (released since the writing of the above *Koch* opinion but prior to its publication) have decided this issue of a trustee's standing in diametrically opposite ways. The Eighth Circuit, relying on *Caplin*, has held that a bankruptcy trustee has no standing to assert an alter ego claim on behalf of the debtor's creditors. *In re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987). Although the trustee in *Caplin* was found not to have standing to sue a third party on behalf of debenture holders, whose claims were specific and personal to them and amounted to only \$4.3 million of the \$60 million in total liabilities of the debtor corporation, the Eighth Circuit broadly construed that holding to justify its decision that a trustee cannot bring an alter ego action on behalf of creditors. 816 F.2d at 1230. Basing its analysis of the debtor's property on Arkansas law, and arising from an appeal by the debtor's principals of a bankruptcy court's judgment in favor of the trustee, *Ozark Restaurant* is both factually and legally distinguishable from the case herein. The Fifth Circuit, in contrast, held in *In re S. I. Acquisitions, Inc.*, 817 F.2d 1142 (5th Cir. 1987), that a creditor's alter ego action is a right of action belonging to the debtor and, as such, is section 541 property of the estate. 817 F.2d at 1153. The court first found that the alter ego remedy under Texas law was available to all creditors, including the corporation itself, which "may pierce its own corporate veil and hold accountable those who have misused the corporation in order to meet its corporate obligations." 817 F.2d at 1152. Further determining that the creditor's action was not personal to it, but rather a general claim that would benefit all of the debtor's creditors, 817 F.2d at 1153, the Fifth Circuit concluded that the automatic stay of section 362(a)(3) applied to the creditor's alter ego action because it was a claim of the debtor corporation. 817 F.2d at 1154.

particular could not recover in his own right on the alter ego theory. Slip op. 11, 28. Because of the great difficulties in determining whether each creditor might have such a cause of action, the court finally concluded that a trustee could not maintain such an action on behalf of creditors.¹² Slip op. 11, 28-29, 31.

State law governs the causes of action that can be asserted by a bankruptcy trustee and by creditors. This court does not presume to comment on the Tennessee appellate court's interpretation of its own laws. However, appellants herein seek to adopt the *Vencap* holding to the circumstances of this case, as justification for the general proposition that a trustee's limited capacity does not allow him to bring an alter ego claim on behalf of creditors. This approach, if broadly applied, reflects a basic misunderstanding of the trustee's role in bankruptcy. It is axiomatic that the trustee has the right to bring any action in which the debtor has an interest, including actions against the debtor's officers and directors for breach of duty or misconduct. *Pepper v. Litton*, 308 U.S. at 307. In that capacity, the trustee acts to benefit the debtor's estate, which ultimately will benefit the debtor's creditors upon distribution. He also has creditor status under section 544 to bring suits for the benefit of the estate and ultimately of the creditors. See *Matter of Kaiser*, 791 F.2d at 76; *In re Western World Funding, Inc.*, 52 B.R. at 773-74.

However, the trustee has no standing to bring *personal* claims of creditors. A cause of action is "personal" if the claimant himself is harmed and no other claimant or creditor has an interest in the cause. But allegations that could be asserted by any creditor could be brought by the trustee.

¹² Had the trustee been able to maintain an alter ego action on behalf of creditors, benefit would have accrued to all creditors. At that stage, a determination of the position of each individual creditor in his right to recover in the *pro rata* distribution could be made on an equitable basis, and those undeserving of recovery could be equitably subordinated pursuant to 11 U.S.C. § 510(c).

tee as a representative of all creditors. If the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors, it is a general claim. See 3A *Fletcher Cyc Corp* §§ 1134, 1277.1 (rev. perm. ed. 1986).

A trustee may maintain only a general claim. His right to bring a claim "depends on whether the action vests in the trustee as an assignee for the benefit of creditors or, on the other hand, accrues to *specific* creditors." *Cissell v. American Home Assurance Co.*, 521 F.2d 790, 793 (6th Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976) (trustee lacked standing to seek performance of an insurance policy on behalf of certain specific creditors of the debtor). See also *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 436 (1986).

The equally valid mirror-image principle is that a single creditor may not maintain an action on his own behalf against a corporation's fiduciaries if that creditor shares in an injury common to all creditors and has personally been injured only in an indirect manner. *Delgado Oil Co., Inc. v. Torres*, 785 F.2d 857, 861 (10th Cir. 1986) (liability of the corporation's fiduciary for violating a trust relationship applied to all creditors); *Ford Motor Credit Co. v. Mingos*, 473 F.2d 918, 920-21 (4th Cir. 1973) (right of action for directors' negligent mismanagement may only be maintained in name of corporation or its receiver if insolvent); *Dana Molded Products, Inc. v. Brodner*, 58 B.R. 576, 580 (N.D. Ill. 1986) (creditor may not bring action against corporation's fiduciaries where the creditor is harmed indirectly); *In re Western World Funding, Inc.*, 52 B.R. at 773 (action for fiduciary misconduct must be brought in the name of the corporation for the benefit of all persons entitled to participate in the recovery).

To determine whether an action accrues individually to a claimant or generally to the corporation, a court must look to the injury for which relief is sought and consider whether it is peculiar and personal to the claimant or general and common to the corporation and creditors. In the

oil companies' complaint, the two allegations of injury are these:

(d) That the Member-Owners are now jointly and severally liable to ECI's estate and to its creditors because of the Member-Owners' misuse of ECI and of ECI's corporate form;

(e) That the Plaintiffs are entitled to recover from the Member-Owners . . . due to the Member-Owners' manipulation of ECI to the detriment of plaintiffs.

The injury alleged by the oil companies, it can be clearly seen, is to the corporation directly and to the oil companies indirectly. The trustee's complaint, as well, underscores that the debtor is a victim of the Member-Owners and has been harmed directly. The oil companies are only indirect or secondary victims; they have alleged nothing about their detrimental position that is peculiar and personal to them and not shared by ECI's creditors.

A Nevada bankruptcy court thoroughly considered similar issues in *In re Western World Funding, Inc.*, 52 B.R. 743 (Bankr. D. Nev. 1985). Although its determinations are not binding upon this court, its well-reasoned approach is noteworthy. In that case, the trustee's complaint contained allegations of breach of fiduciary duty, conversion of corporate assets, and alter ego. Defendants, controlling fiduciaries of the debtor, argued that the trustee was not authorized to bring the alter ego claim by either section 541 or 544(a) because it is a right of action which belongs to creditors personally. The bankruptcy court found that the trustee had standing to bring the alter ego action on several grounds. First, the trustee had the right to sue the debtor's fiduciaries under section 544 on behalf of all creditors, for it was they who should benefit from any recovery. *Id.* at 774. Under Nevada law, he could invoke the alter ego doctrine as a hypothetical lien creditor establishing the extent of his lien on all property which a creditor might reach to bring into the expansive section 541 definition of "property of the estate." *Id.* at 783. He could also use the doctrine, as the representative of the

debtor's estate, to establish whether the assets of the alleged alter ego are subject to his administration because the debtor has an equitable interest in them. *Id.* at 783-4. And finally, the trustee is an "independent voice" protecting the creditors of the bankrupt corporation by asserting the alter ego claim against fiduciaries who would virtually never institute an action against themselves. *Id.* at 784.

In the case now before us, the complaint of these appellants alleges no harm specific to them personally, no loss to them in their individual capacities. (In contrast, the trustee's complaint in the bankruptcy proceedings has specified facts and circumstances to support its assertion that the corporation itself has been directly injured by misuse of the corporate form by fiduciaries.) In fact, at this point the oil companies show no harm from actions of the Member-Owners or of ECI, which had fulfilled its obligations to the oil companies in full prior to the bankruptcy. The injury they allege is the trustee's lawsuit against them.

If the trustee succeeds in his preference action and recovers the amounts conveyed to the oil companies within the preference period, the oil companies will become creditors and will certainly seek reimbursement of those transfers. However, even in that posture they allege no personal injury; they are similarly situated to other creditors who have been treated inequitably by the debtor and thus share in the common injury.

D.

One area of the Bankruptcy Code that explicitly recognizes the right of a bankruptcy trustee to bring an alter ego claim against fiduciaries of the debtor is 11 U.S.C. § 510, "Subordination." Section 510 was created in the 1978 Code as a codification of long-standing case law empowering the bankruptcy courts to subordinate any valid claim against the bankruptcy estate "when principles of equity would be offended by the allowance of such claims

on a parity with those of other creditors." 3 *Collier on Bankruptcy* ¶ 510.01 at 510-3. This ability to classify or rank claims reflects the essence of the court's broad equitable powers by which the overall result of a bankruptcy proceeding is assured of being inherently fair to all the interested parties.

A debtor corporation's officers, directors and controlling shareholders are "insiders" of the debtor as defined in 11 U.S.C. § 101(28). Any transactions between a debtor and an insider of the debtor are subject to heavy scrutiny. 2 *Collier on Bankruptcy* ¶ 101.28 at 101-42.14. If the trustee (or another interested party) can give evidence of an insider's domination and control of the debtor corporation and can show that the corporation is a "mere instrumentality" of the insider and that other creditors have been prejudiced by the insider's conduct, the court will pierce the corporate veil. See 3 *Collier on Bankruptcy* ¶ 510.05 at 510-12. If the court finds that such dealings are inherently unfair, it is within its equitable powers to subordinate or disallow the insider's claims pursuant to section 510(c).

The Supreme Court's landmark bankruptcy decision *Pepper v. Litton*, 308 U.S. 295 (1939), is the classic presentation of the doctrine of equitable subordination and the clearest expression of a bankruptcy court's broad equitable powers. In it the Court reversed the appellate ruling and upheld the district court's determinations that a debtor corporation and its owner were "in reality the same," *id.* at 301, and that the owner's claim was properly disallowed or subordinated. *Id.* at 311.

In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate. And its duty so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director, or stockholder.

Id. at 307-08.

The *Pepper* court emphasized that the fiduciary role of directors or stockholders is based upon their "powers in trust." If their dealings with the corporation are challenged, they have the burden of proving the good faith and inherent fairness of the transaction. "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside." *Id.* at 306-07.

The broad factors suggested by the court for subordination of a fiduciary's claim are quite similar to the basic alter ego requirements;¹³ and in both cases "liability is imposed to reach an equitable result." *Brunswick Corp. v. Waxman*, 599 F.2d at 36. The court acknowledged with approval the use of equitable subordination when the facts showed that the debtor has been used merely as a corporate pocket of the dominant stockholder, *id.* at 309, and specified that the proper party to bring actions against fiduciaries was the trustee:

While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders.

Id. at 307.

¹³ The Fifth Circuit's test for subordinating claims in *Matter of Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977) has been adopted by many courts as the standard formulation of criteria for applying the doctrine of equitable subordination. See *In re N & D Properties, Inc.*, 799 F.2d 726 (11th Cir. 1986); *In re Westgate-California Corp.*, 642 F.2d 1174 (9th Cir. 1981); *In re Multiponics*, 622 F.2d 709 (5th Cir. 1981); *In re Pacific Express*, 69 B.R. 112 (Bankr. 9th Cir. 1986); *In re Loop Hospital Partnership*, 50 B.R. 565 (Bankr. N.D. Ill. 1985).

This clear statement by the Supreme Court that alter ego principles may be appropriate criteria for equitably subordinating or disallowing claims of fiduciaries, and that the trustee has standing to bring actions against fiduciaries, is universally upheld. Equitable subordination exemplifies the underlying premise of bankruptcy policy, which is an equitable balancing of the interests of all affected parties in a bankruptcy case. That balancing considers the degree of hardship faced by each party, as well as any qualitative differences in the hardships each may face, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); but it also considers the level of duty owed by each party to the debtor and the good faith basis of their interactions. *Pepper v. Litton*, 308 U.S. at 306-07. The alter ego doctrine reflects that same tradition of equity, the same purposes of protecting innocent parties and of securing just, balanced results as does the equitable subordination doctrine. Both theories intend to produce results of inherent fairness to all interested parties at different stages of the bankruptcy proceeding. The equitable subordination doctrine applies when it is necessary to consider a fiduciary's relationship and obligations to the debtor at the time of distribution. Assuming that state law does not otherwise bar its use, the alter ego theory applies just as properly earlier in the bankruptcy proceeding to reach assets of fiduciaries that equitably belong in the debtor's estate.

E.

The trustee is the proper party to enforce fiduciary obligations "for the protection of the entire community of interests in the corporation—creditors as well as stockholders." *Pepper v. Litton*, 308 U.S. at 307. However, appellants herein insist that there are two reasons that the trustee cannot represent their interests when he brings an alter ego action against the Member-Owners.

First, they assert that they are not creditors, but rather preference defendants. Thus, the trustee cannot represent

them in his creditor capacity pursuant to section 544.¹⁴ However, it is clear from the final allegation of the oil companies' complaint that the appellants intend to claim joint and several liability of the Member-Owners only if the trustee should recover preferential transfers from them, "because, at the time of any recovery by the Trustee, Plaintiffs will become creditors of ECI for that amount."

As preference defendants, appellants are now "potential" or "contingent" creditors. If they become creditors, the trustee's pursuance of the alter ego claim will benefit them, for they will participate in the distribution of assets available to all creditors. On the other hand, if they do not become creditors (that is, if the trustee does not succeed in proving the preferential transfers to them), they will have no interest in the relationship between ECI and the Member-Owners, for they presumably will have no need to be a party in the bankruptcy.

Secondly, the oil companies contend that the ECI trustee is not an effective representative of their interests.

¹⁴ In this context, appellants have also asserted a due process argument: If they are not allowed to bring this declaratory action, they will be deprived of their due process right to have their interests fully and fairly represented in the alter ego litigation against the Member-Owners. However, as is shown above, these parties have no quarrel with the Member-Owners or the debtor until they become creditors, and therefore can claim no real interest in the possibility of an alter ego relationship between them at this time. Nevertheless, the oil companies can protect their interests. They have the option of intervening in the ongoing alter ego action in the bankruptcy court pursuant to Rule 24 of the Rules of Civil Procedure, or of filing a motion in the bankruptcy court requiring the trustee to abandon the alter ego claim so that they can assert it, pursuant to Bankruptcy Rule 6007(b). If they do become creditors, they will have all the rights of creditors in the Bankruptcy Code, and the trustee will adequately represent their rights, as was determined by the bankruptcy court in previous litigation. See footnote 1. Appellants offered no adequate showing of deprivation of their rights at this time or in the future.

They claim that he has filed two irreconcilable suits: one against them to recover alleged preferential transfers, and another against the Member-Owners on the alter ego theory. In the first adversarial action he is attacking the appellants; in the second he claims to be asserting their interests as well as the interests of all creditors of ECI. Appellees respond that it is in the nature of a trustee's duties to be a representative of the entire bankruptcy estate as well as of creditors, and that no conflict of interest has arisen.

Appellants' claim misinterprets the paramount duty of a trustee, which is the amassing of estate assets for a *pro rata* distribution to all creditors. There is no conflict of interest in his collecting all property available under state law as representative both of the debtor and of the creditors, for any property brought into the estate will benefit creditors. The trustee has the additional role of investigating the debtor in his activities and of scrutinizing all parties in close relationship with the debtor for abuses that will harm the creditors. In that capacity, as well as in his capacity as representative of the general creditors, he can pierce the veil of the debtor corporation harmed by the misconduct of fiduciaries in order to reach the assets of those fiduciaries. And because the corporation itself was injured, it is not *in pari delicto* with the wrongdoers. "The corporation is not at fault for being the alter ego of the defendants, just as it is not liable for the defendants' breach of fiduciary duty to it." *In re Western World Funding, Inc.*, 52 B.R. at 781. For this reason there is no conflict in the trustee maintaining an alter ego action.

The responsibility of a trustee is a heavy one. His fiduciary obligations are parallel to those of fiduciaries of non-bankruptcy trusts: He must be loyal to the interests of all beneficiaries and must defend those interests scrupulously. At the same time, the very circumstances of a bankruptcy establish conflicting interests: insufficient assets for the potential beneficiaries; different classifications and treatment of claimants under bankruptcy law;

attempts by claimants to collect as much of the debtor's estate for themselves as possible, to the detriment of other possible beneficiaries. Often a trustee must sue claimants because of situations like those of this case. "A good percentage of the litigation in which the trustee engages is against those who are creditors of the estate or who will become so if litigation to recover transfers is successful." 1 *Cowans*, § 2.7 at 76. In order to properly perform his duties under the Bankruptcy Code, therefore, the trustee must protect "the interests of creditors collectively and in so doing may litigate against creditor interests individually." *Id.*

Despite the conflicts of the competing interests of self-serving parties in interest in a bankruptcy case, the trustee himself is not in conflict. His attention is directed to the diligent recovery of the debtor's assets for the benefit of all claimants, and he strives for equality of distribution. *Sampsell v. Imperial Paper Corp.*, 313 U.S. at 219.

Correspondingly, those parties attempting to challenge the adequacy of a trustee's representation of their interests have a heavy burden. Plaintiffs failed to demonstrate the trustee's inadequacy in *Heyman v. Exchange Nat. Bank of Chicago*, 615 F.2d 1190 (7th Cir. 1980) and *Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290 (6th Cir. 1983). Appellants herein have similarly been unsuccessful.

IV.

We have addressed the oil companies' allegations that the trustee lacks standing to maintain an alter ego cause of action and is unable to represent appellants adequately in the bankruptcy alter ego litigation against the Member-Owners, and have found appellants' arguments to be without merit. We now return to their assertion that they themselves satisfy the constitutional requirements for standing and find that this contention, as well, is unpersuasive.

A party bringing a declaratory action must show an actual controversy and a direct injury or threat of injury that is "real and immediate, not conjectural or hypothetical." *Foster v. Center Township of LaPorte County*, 798 F.2d 237, 242 (7th Cir. 1986). The facts alleged in the pleadings must show "that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

We first find that appellants' threat of injury is not sufficiently immediate. The oil companies do allege real injury in the form of the preferential transfer suit against them by the ECI bankruptcy trustee. However, the fact that these appellants have been sued in the bankruptcy proceeding for preferential transfers or that they might someday become actual creditors of ECI "is palpably inadequate to confer standing" on them to challenge the Member-Owners' relationship to the debtor.¹⁵ *Foster*, 798 F.2d at 242. That future harm is, at this point, still conjectural rather than actual and "insufficient to constitute an injury-in-fact, threatened or actual, within the meaning of Article III." *Id.* See *Larsen v. Valente*, 456 U.S. 228, 238-39, *reh'g denied*, 457 U.S. 1111 (1982); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-74 (1982); *Valley Forge*, 454 U.S. at 471-72.

Furthermore, appellants have not shown that they have sustained "a direct injury as a result of the defendants' conduct." *Foster*, 798 F.2d at 242. The harm contemplated

¹⁵ The issue of ripeness was also raised in this context. Ripeness requires a showing that appellants will sustain an immediate injury from the challenged action or conduct of defendants. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81-82 (1978). Appellants have shown that they might sustain an injury from the ECI bankruptcy trustee, but not from the defendants herein. Therefore, the issues as thus presented in this appeal are not ripe for judicial determination.

by the oil companies might come from the ECI trustee but not from these defendants. Appellants have not shown a direct injury to themselves as a result of challenged conduct of the Member-Owners. A party claiming standing must indicate in its complaint that the injury which it suffers "is indeed fairly traceable to the defendant's acts or omissions." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 261 (1977). The complaint of the oil companies alleges no injury to them by the named defendants. They have sought a declaration that the Member-Owners harmed ECI, and that the Member-Owners' manipulation of ECI had a detrimental effect on them; this secondary or resultant effect is not a sufficient showing that they themselves were injured by the Member-Owners.

The complaint must show a "substantial controversy between parties having adverse legal interests." *Golden v. Zwickler*, 394 U.S. at 108. Because no injury is traced to these defendants in the pleadings, appellants have not met their burden of establishing a concrete and reviewable controversy between themselves and the Member-Owners.

Appellants have stated that they wanted to use the declaratory judgment of the alter ego relationship between ECI and its Member-Owners as a defense in the preference suits. However, Article III requires a genuine resolution of actual controversies so that "a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." *Bender v. Williamsport Area School District*, ___ U.S. ___, 106 S.Ct. 1326, 1332 (1986). The oil companies' intended use of the district court's decision to "pave the way" for another lawsuit by deciding "some, but not all, of the facts of the case" is forbidden under Article III. *Id.*

In essence, appellants are attempting to put the district court in the role of advising the bankruptcy court of the outcome of its preferential transfer litigation: Should the oil companies be required to turn over those transfers, the district court has already determined that the Mem-

ber-Owners must pay those amounts on behalf of the appellants. This would be the very type of advisory opinion which Article III intends to exclude. *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947).

In order for a case to be justiciable, the dispute must touch upon "the legal relations of the parties having adverse legal interests." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). Appellants have not shown that the parties in this case have adverse legal interests. We therefore conclude that the district court properly granted the Member-Owners' motion to dismiss on the ground that the oil companies' complaint failed to establish their standing to bring their declaratory judgment alleging an alter ego relationship.

SO ORDERED.

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part:

The statutory branch of the majority opinion confronts, it seems to me, very serious problems of legal theory but resolves them on an essentially pragmatic basis. The essential theoretical question is whether ECI could ever have maintained an action against its member-owners on the ground that ECI was the alter ego of the owners. Apparently, ECI could not have carried on such an action:

The doctrine of alter ego does not create assets for or in the corporation. It simply fastens liability upon the individual who uses the corporation merely as an instrumentality in the conduct of his own personal business. The liability springs from fraud. The fraud from which it arises is not perpetrated upon the corporation, but upon third persons dealing with the corporation.

Garvin v. Matthews, 193 Wash. 152, 156-57, 74 P.2d 990, 992 (1938) (citations omitted). Without dealing directly with

this problem of theory, the majority has concluded that the trustee, in marshalling ECI's assets, may maintain an alter ego action against the member-owners.

Despite the rather basic conceptual problems, policy considerations favoring vesting the action in the trustee encourage a sufficiently broad construction of section 541 to empower the trustee to bring an alter ego action. There seems to be enough authority to support this construction, and I therefore join the majority on this point.

I do not, however, agree that the oil companies fail to meet the constitutional requirements for standing. It seems to me that the filing of suit by the trustee to set aside preferential transfers to the oil companies creates an injury that is sufficiently "distinct and palpable" and "fairly traceable" to the named defendants. *Allen v. Wright*, 468 U.S. 737, 751 (1954). The oil companies have brought this suit as a defense to the trustee's preference actions. A trustee may recover preferential transfers only if the debtor was actually insolvent when it filed for bankruptcy. In this alter ego suit, the oil companies sought an order declaring, among other things, that ECI was solvent, which would thereby preclude the trustee's preference actions. In addition, if the trustee's suits are successful, the oil companies will become creditors with a clear interest in maximizing the assets available to them in a distribution. In effect, the allowed misuse of the corporate form by the owner-members has defrauded ECI's creditors.

I therefore concur in the result reached by the majority on statutory grounds, but would not find this lawsuit to be barred by the Constitution.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

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APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 85 C 6745

KOCH REFINING, et al.,

Plaintiffs,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., et al.,

Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the court on the defendants' motion to dismiss. For the following reasons, the motion will be granted.

This action is one of many stemming from the insolvency of Energy Cooperative, Inc. (ECI). The plaintiffs in this lawsuit are a number of oil companies which have been sued in separate litigation by the trustee in bankruptcy to recover alleged preferences under the Bankruptcy Code. The oil companies here seek a declaratory judgment that the defendants, the member-owners of ECI, operated ECI as their alter ego and are therefore jointly and severally liable for all of ECI's debts. The plaintiffs also seek a declaration that, should the trustee prevail in his preference actions against the plaintiffs, the member-owners are liable to the plaintiffs for any amounts recovered thereby.

This lawsuit is before this court following a finding of relatedness between this case and one brought by the trustee against the member-owners, referred to by the parties here as "the member-owner litigation." In the member-owner litigation, the trustee is seeking to impose joint and several liability on the member-owners in such amounts as might be necessary to pay all obligations of ECI. The complaint alleged that ECI should be viewed as the alter ego and agent of the member-owners and that the member-owners should be held jointly and severally liable to ECI by virtue of facts that warrant "piercing of the corporate veil." In essence, the allegations are the same as those made by the plaintiffs here. Seven unsecured creditors then intervened as plaintiffs, forcing the court to decide whether the unsecured creditors or the trustee could properly bring this action. The court ruled:

After careful consideration of the issues, the court agrees with the trustee and the intervening plaintiffs that the cause of action . . . properly belongs to and should be prosecuted by the trustee, rather than the intervening plaintiffs . . . [A] trustee of a bankrupt corporation represents creditors and is the proper party to bring suit against directors and stockholders for mismanagement, misappropriation of assets, or breach of fiduciary duty.

Energy Cooperative, Inc. v. Farmers Union Central Exchange, Inc., No. 85-3537 (N.D. Ill. Feb. 4, 1985).

The member-owners have now moved to dismiss the complaint in this case on the grounds that the plaintiffs lack standing to bring this claim, that the complaint essentially seeks indemnity and as such fails to state a claim upon which relief can be granted, and that the suit will not ripen into a justiciable case or controversy unless and until the plaintiffs are found liable to the estate. I need only address the first of these arguments.

The plaintiffs assert that they have standing to sue the member-owners for breach of fiduciary duty and misuse of the corporate form because they have been harmed by

such actions. The plaintiffs reason that had the member-owners not breached their duty to ECI and treated ECI as their alter ego, ECI would not have become insolvent, and the plaintiffs would not now be defendants in the preference actions and face the possibility of becoming creditors of ECI. Status as a creditor or a potential creditor is not enough to confer standing upon the plaintiffs. Contrary to the plaintiffs' assertion, standing requires more than a showing of actual or threatened injury. The doctrine of standing also requires that a plaintiff be the proper party to assert the particular legal issue. *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 2873 (1976); *Peoples Gas, Light & Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1193 (7th Cir. 1981).

The proper party to bring suit against directors and stockholders of a bankrupt corporation for mismanagement, misappropriation of assets, or breach of fiduciary duty is the trustee of the estate. Damages resulting from the neglect of duty by a corporate fiduciary are recoverable by the corporation, and the right to recover such damages passes to the trustee in bankruptcy. *In re O.P.M. Leasing Services, Inc.*, 28 B.R. 740, 759 (Bankr. S.D.N.Y. 1983); *In the Matter of Happy Time Fashions, Inc.*, 7 B.R. 665, 670 (Bankr. S.D.N.Y. 1980); R. Ginsberg, Bankruptcy ¶5103 (1985). Since the plaintiffs are not the proper parties to recover damages from the members, they also lack standing to obtain a declaratory judgment. 10A C. Wright, A. Miller, & M.K. Kane, Federal Practice & Procedure §2757 (2d ed. 1983).

The plaintiffs have attempted to distinguish this court's February 4, 1985 ruling that creditors of ECI were not the proper parties to bring similar claims seeking to pierce the corporate veil. The plaintiffs argue that that decision does not apply to them because they are not creditors of the estate. The gist of that ruling, however, was that the cause of action belongs to the trustee in bankruptcy. The fact that these plaintiffs are only potential creditors rather than actual creditors does not mean that these plaintiffs are the proper parties to raise the alter ego

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issue; indeed, it means only that any injury suffered by these plaintiffs is more speculative. Therefore, the court finds that these plaintiffs lack standing to sue and that the complaint must be dismissed.

/s/ CHARLES P. KOCORAS
United States District Judge

Dated: 12/23/85

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

KOCH REFINING et al

v.

Case Number: 85 C 6745

FARMERS UNION CENTRAL
EXCHANGE, INC. et al

- ☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this cause of action is hereby dismissed.

December 23, 1985

Date

H. STUART CUNNINGHAM
Clerk

/s/
(By) Deputy Clerk



APPENDIX C

RULE 28.1 LISTING

Petitioner Koch Refining Company's subsidiaries that are not wholly owned are Bow River Pipe Lines, Ltd. (Canada) and Koch Exploration Canada Ltd. Its affiliates are Quanah Pipeline Limited, Minnesota Pipe Line Co., Chase Terminal Company, Chase Transportation Co., South Saskatchewan Pipe Line Co., Reiss Line of Canada Ltd., Abcor Japan Co. Ltd., Divmesh Separators Ltd., and Koch Abengoa (Spain). Its parent is Koch Industries, Inc.

Petitioner Koch Fuels, Inc. has no subsidiaries not wholly owned. Its affiliates are Quanah Pipeline Limited, Minnesota Pipe Line Co., Chase Terminal Company, Chase Transportation Co., South Saskatchewan Pipe Line Co., Reiss Line of Canada Ltd., Abcor Japan Co. Ltd., Divmesh Separators Ltd., and Koch Abengoa (Spain). Its parent is Koch Refining Company.

Petitioner Conoco Inc.'s affiliates that are not wholly owned are: ACE Limited; Ameropa Coal Trading and Shipping Inc.; Associated Petroleum Terminals Ltd.; Benzene Marketing Co. Ltd.; Big Sky of Montana Realty, Inc.; Cardinal River Coals, Ltd.; Cit-Con Oil Corporation; Cliffe Storage Ltd.; Colonial Pipeline Company; Coman I Limited; Coman II Limited; Coman III Limited; Conch International Methane Ltd.; Conoco Exploration, Ltd.; Conoco (U.K.) Limited; Contrhein Coal Co.; Continental Oil Limited; Crude Oil Terminals (Humber) Ltd.; Dixie Pipeline Company; EXEL Limited; Explorer Pipeline Company; Felix Oil Company; Geisum Oil Co.; Harmar Coal Co.; Humber Oil Terminals Trustee Ltd.; Iranian Invest-

ment Corporation; Iranian Oil Participants Ltd.; Iranian Oil Services (Holdings) Ltd.; Iricon Agency, Ltd.; Juliana Coal Co.; Jupiter Chemicals, Inc.; Kettleman North Dome Assoc.; Khalda Petroleum Co.; K/S Statfjord Transport A.S. & Co.; Lake Charles Pipe Line Company; Long Beach Oil Development Company; Mathies Coal Co.; Milne Point Pipe Line Company; Neptune Bulk Terminals (Canada) Ltd.; Oasis Oil Co. of Libya, Inc.; Oberrheinische Mineraloelwerke Gmbtl (OMW); Petroleum Storage Ltd.; Petroleum Terminals, Inc.; Pioneer Pipe Line Company; Platte Pipe Line Company; Societue da Pipeline Sad-Europueenne; Statfjord Transport A.S.; T.A.L. (Austria); T.A.L. (Italy); The Standard Shale Products Company; Tidelands Royalty Trust; Tongue River Holdings Inc.; Tongue River Railroad; Warwickshire Oil Storage Ltd. and Yellowstone Pipe Line Company. Its parent is Conoco Delaware, Inc., which is wholly owned by E.I. duPont de Nemours and Company.

Petitioner Mobil Oil Corporation's parent is Mobil Corporation. Listed below are the affiliates and subsidiaries of Mobil Corporation, Mobil Oil Corporation, and their affiliates and subsidiaries which are or may be publicly held. [For purposes of this list only companies in which a five percent (5%) or greater interest is held are considered]:

- Abu Dhabi Petroleum Company Limited
- Ace Polymer Co., Ltd.
- Adria-Wien Pipeline Gesellschaft m.b.H.
- AIMCO (ALPHA) Shipping Company
- AIMCO Holdings Limited
- AIMCO (OMEGA) Shipping Company Ltd.
- Aircraft Fuel Supply B.V.
- Airtankdienst Koln
- AK Chemie GmbH
- AK Chemie GmbH & Co. KG
- Akauma Asphalt Industries, Ltd.
- Alexandroupolis Petroleum Installation S.A.
- Allied Asphalts Limited

Alpa Alet Ve Dayanikli Tuketim Mamulleri
Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ammenn GmbH
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian Energy Company Limited, The
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.
Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjelivegen
The Associated Ocel Company Limited
Associated Ocel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheersmaatschappij MOBEM
Bayerische Brdgasleitung GmbH
Bin Sulaiman Mobil Towers
Bayerische Mineral Industrie A.G.
Beer GmbH
Beer GmbH & Co. Mineralol-Vertriebs - KG
Bow Fortune S.A.
Bow Spring Shipping S.A.
Bow Star S.A.
Bow Sun S.A.
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Canyon Reef Carriers, Inc.
CAS (Combined Automation Systems) B.V.
Carburanti Lubrificanti E Affini Meridionali
(CLEAM S.p.A.)

Celmisia Shipping Corporation
 Central African Petroleum Refineries (Pvt) Limited
 Central Kagaku Kabushiki Kaisha
 Cercera S.A.
 Changi Airport Fuel Hydrant Installation Pte. Ltd.
 Chuo Nenryo Gas Kabushiki Kaisha
 Colombianos Distribuidores de Combustibles, S.A.
 (CODI)
 Colonial Pipeline Company
 Comet-Brennstoffdienst GmbH
 Commercial Polymers Pty. Ltd.
 Commodore Maritime Company, S.A.
 Campagnie Africaine de Transport Cameroun
 Campagnie D'Entreposage Communautaire
 Compagnie Rhenane de Raffinage
 Compagnie Senegalaise des Lubrifiants (C.S.L.)
 Compania de Lubricants de Chile Limitada
 (Copec-Mobil Ltda.)
 Compania Mexicana de Especialidades Industriales,
 S.A. de C.V.
 Consortium Raymond Duez
 Cook Inlet Pipe Line Company
 Cyprus Petroleum Refinery Limited
 D. Muhlenbruch GmbH
 D. Muhlenbruch GmbH & Co. KG
 De. Ba. S.p.A. - Industria Petrolifero Deposito
 di Bari
 Depot Petrolier de Mourepiane
 Depot Petrolier du Gresivaudan
 Depot de Petrole Cotiers
 Depots Petroliers de La Corse (DPLC)
 Deutsche Pentosin-Werke GmbH
 Deutsche Transalpine Oelleitung GmbH
 Dicomi S.r.l.
 Dixie Pipeline Company
 Dukhan Services Company
 East Japan Oil Development Company Ltd.
 Eastern Lease Company Ltd.
 East Texas Salt Water Disposal Company
 Energas S.r.l.

Entrepot Petrolier de Chambéry
 Entrepot Petrolier de Dijon
 Entrepot Petrolier de Mulhouse (E.P.M.)
 Entrepot Petrolier de Nancy
 Entreprise Jean Lefebvre
 Erdgas-Verkaufs-Gesellschaft mbH
 Erdoel-Lagergesellschaft mbH
 Erdoel-Raffinerie Neustadt GmbH & Co. oHG
 Erdoelbetrieb Reithbrook
 Etablissements Bouthenet
 Ets. Starck & Cie
 Europetrol S.p.A.
 Faavang Autoverksted A/S
 Fairwind Maritime Company, S.A.
 Felix Oil Company
 Fibil, S.A.
 Filtros De Costa Rica S.A.
 Frome-Broken Hill Company Proprietary Limited
 Fruehmesser Mineraloelhandels GmbH & Co. KG
 Fruehmesser GmbH
 Fuso Operations Kabushiki Kaisha
 Futuro Enterprises (Christchurch) Ltd.
 Futuro Homes (N.Z.) Ltd.
 Gatwick Refueling Services Limited
 Gaz Aletleri Anonim Sirketi
 Geomines-Caen
 Geovexin
 Ghana Bunkering Services Limited
 Goteborgs Branslesortering AB
 Groupement Immobilier Petrolier G.I.P.
 Groupement Petrolier Aviation G.P.A.
 Groupement Petrolier DeBrest (GPB)
 Handelmaatschappij Hugenholtz & Co. B.V.
 Haniel Handel GmbH
 H. van der Heijden Service Stations B.V.
 Heizoel-Handelsgesellschaft mbH
 Hellas Gas Storage Company S.A.
 Hormoz Petroleum Company
 Hydranten-Betriebs-Gesellschaft, Flughafen
 Frankfurt

Industria Interamericana De Filtros Ltda.
(INTERFIL)
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Iside, S.p.A.
Istanbul Petrol ve Makine Yaglari Limited
Sirketi
Italoil S.p.A.
Japan Airport Fueling Service Co. Limited
J.E.C.O.P.
K.K. Sankyo Plastics
K.K. Toresen
Kansai Petro Terminal Co., Ltd.
Kanto Kygnus Sekiyu Hambai K.K.
Karl Storz GmbH & Co. KG
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kubler Heizol A.G.
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu Kabushiki Kaisha
Kyokyo Petroleum Overseas, Ltd.
Kyokyo Sekiyu Kogyo Kabushiki Kaisha
La Centrafricaine des Petroles (PETROCA)
Likit Petrol Gazi ve Yakit Ticaret A.S.
Lubland Limited
Lubricantes del Sur, S.A.
Marceaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.

Milan Airport Refueling Service
 Mediterranean Refining Company
 Meentzen & Franke GmbH & Co.
 Meritrans S.p.A.
 Mertl GmbH
 Mineralol-Handels-Gesellschaft MbH
 Mobil Atlas Sociedad Anonima de Capital
 Variable
 Mobil Catalysts Corporation of Japan
 Mobil Comercio, Industria e Servicos Ltda.
 Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
 Mobil Korea Lube Oil Industries Inc.
 Mobil Motor Rest AG
 Mobil Nile Oil Company
 Mobil Oil Gabon
 Mobil Oil Ghana Limited
 Mobil Oil Maroc
 Mobil Oil Nigeria Limited
 Mobil Oil Nord-Africaine
 Mosul Petroleum Company Limited
 Motel Rest SA
 Mt. Marrow Blue Metal Quarries Pty.
 Near East Development Corporation
 New Zealand Refining Company Limited, The
 New Zealand Synthetic Fuels Corp. Ltd.
 New Zealand Synthetic Fuels (Housing)
 Corporation Limited
 Nichimo Oil (Bermuda) Co., Ltd.
 Nichimo Sekiyu Seisei Kabushiki Kaisha
 Nippon Unicar Company Limited
 Norddeutsche Erdgas-Aufbereitungs GmbH
 Nottingham Gas Limited
 N.V. Rotterdam-Rijn Pijpleiding Mattschappij
 N.V. Socony-Standard-Vacuum Oil Company
 Octel Associates
 Octel S.A.
 Oilkol (Proprietary) Limited
 Oil Service Company of Iran (Private Company)
 Oldenburgische Erdoel Gesellschaft mit
 beschränkter Haftung

Olympic Pipe Line Company
 P.T. Arun Natural Gas Liquefaction Company
 P.T. Berau Coal
 P.T. Stanvac Indonesia
 Paloma Pipe Line Company
 Pars Investment Corporation
 Paul Harling Mineralole GmbH & Co. KG
 P.6 - Groep B.V.
 Peace Pipe Line Ltd.
 Perretti Petroli S.p.A.
 Petrocab
 Petrogas Processing Ltd.
 Petroleum Refineries (Australia) Proprietary
 Limited
 Petroleum Services (Middle East) Limited
 Petrol Fuel S.p.A.
 Petrolrif S.p.A.
 Petromin Lubricating Oil Company
 Petromin Lubricating Oil Refining Company
 Petromin-Mobil Yanbu Refinery Company Ltd.
 Pipe Line Banal de La Goulette
 Plegadizos para la Industria S.A.
 Poly Oil Chimie (P.O.C.)
 Primagaz
 Progas Limited
 Rainbow Pipe Line Company, Ltd.
 Rhodes Petroleum Installation S.A.
 Rivers Court Estates, Limited
 Road Binders (Proprietary) Limited
 Rohol-Aufsuchungs Gesellschaft mbH
 Rundel Mineralolvertrieb GmbH
 Ruhgas Aktiengesellschaft
 Samarco (Alpha) Shipping Company
 Samarco (Beta) Shipping Company
 Santa Clara Waste Water Company
 Sarni S.p.A.
 Saudi Arabian Maritime Company
 Saudi Can Company, Ltd., The
 Saudi Chemical Industries Company Limited
 Saudi Maritime Company Ltd.

Saudi Tankers Limited
 Saudi Yanbu Petrochemical Company
 Schubert Kommanditgesellschaft
 Segher de Mexico, S.A. de C.V.
 Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
 SENERCO
 Seram Societa per Azioni (S.p.A.)
 Sierra Leone Petroleum Refining Company
 Limited, The
 Sociedad Calle 67, Ltda.
 Societa Italiana per l'Oleodotto Transalpino, S.p.A.
 Societe Africaine de Raffinage
 Societe Alfred Ott & Cie
 Societe Belge de Transport par Pipeline S.A.
 Societe Camerounaise des Depots Petroliers
 (S.C.D.P.)
 Societe Camerounaise Equatoriale De Fabrication
 De Lubrifiants "S.C.E.F.L."
 Societe Civile de Mustapha
 Societe Civile Immobiliere Courcelles-Etoile
 Societe Civile Immobiliere de Construction de 34
 Avenue du General Leclerc a Boissy-St. Leger
 Societe Civile Immobiliere de Construction
 "La Residence Brune"
 Societe Civile Immobiliere du 10 Bd. de la
 Republique A La Garenne-Colombes
 Societe Civile Immobiliere Kleber-Etoile
 Societe Civile Immobiliere La Fontaine Saint Lucien
 Societe Dahomeenne d'Entreposage de Produits
 Petroliers
 Societe d'Armement Fluvial et Maritime
 "SOFLUMAR"
 Societe de Construction & de Gestion CB 12
 Societe de Distribution Castelroussine (SODICA)
 Societe de Gaz D'Oceanic (SOGADOC)
 Societe de Gestion des Stocks Petroliers
 de Cote D'Ivoire
 Societe de Manutention de Carburants Aviation
 (S.M.C.A.)

C-10

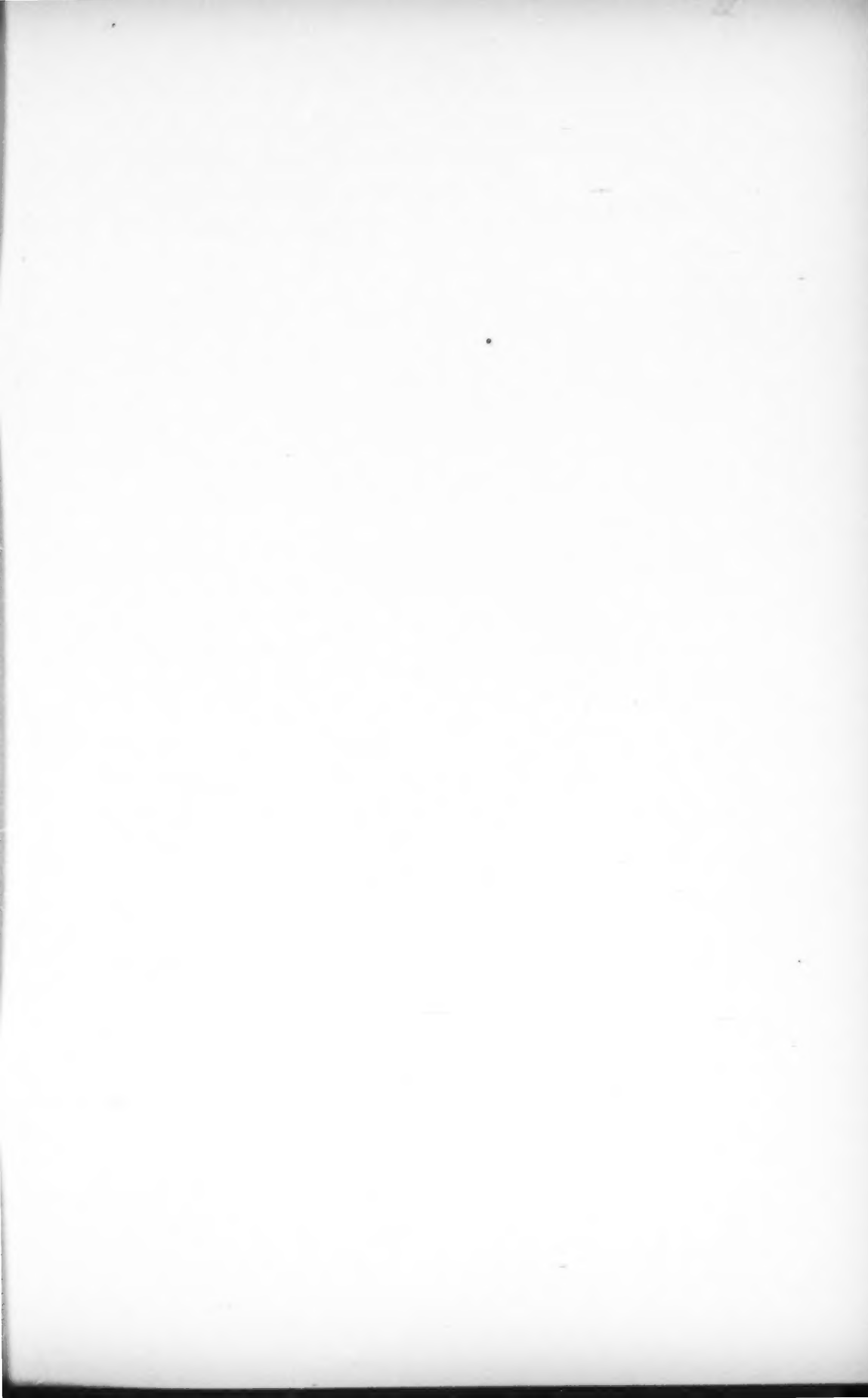
Societe de Manutention de Carburants Aviation
Dakar-Yoff
Societe de Manutention de Carburants Aviation
de Tahiti (SOMCAT)
Societe de Materialx d'Etancheite Pour Le
Entreprises (Meple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage de Gabes
Societe d'Entreposage d'Hydrocarbures de Bingo
(SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe d'Habitations a Loyer Modere de la Seine
Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe Des Huiles Lemahieu
Societe du Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits
Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles
de Lattaquie (Syrie) S.A.
Societe Ivoirienne de Fabrication de Lubrifiants
(S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits
Petroliers
Societe Malienne D'Entreposage (SME)
Societe Nationale de Raffinage (Sonara)
Societe Nouvelle pour l'Epuration des Huiles
de Transformateurs - Septra
Societe Pizo De Formulation De Lubrifiants
(PIZOLUB)
Societe Tahitienne de Depots Petroliers
Societe Tahitienne Des Oleoduce
Societe Tchadienne D'Entreposage de Produits
Petroliers
Societe Togolaise d'Entreposage (STE)

Sonarep (South Africa) (Proprietary) Limited
 SONEX
 South African Oil Refinery (Proprietary) Limited
 South Saskatchewan Pipe Line Company
 Statfjord Transport A.S.
 Sun East Company, Limited
 Sydney Metropolitan Pipeline Pty. Ltd.
 System Plaza Inc.
 T.R. Miller Mill Company, Inc.
 Tankbau GmbH
 Tanklagergesellschaft Koln-Bonn
 Tecklenburg GmbH
 Tecklenburg GmbH & Co. Energiebedarf K.G.
 Thailand Solvent Products, Ltd.
 Thums Long Beach Company
 T.M. Duche Co., Inc.
 Toa Nenryo Kogyo Kabushiki Kaisha
 Tohko Plastics Co., Ltd.
 Tohpren Co., Ltd.
 Tonen Energy International Corp.
 Tonen Maintenance Kabushiki Kaisha
 Tonen Properties, Inc.
 Tonen Sekiyu Kagaku Kabushiki Kaisha
 Tonen Tanker Kabushiki Kaisha
 Tonen Technology Kabushiki Kaisha
 Towa Compounding Company Limited
 Toyoshina Film Co., Ltd.
 Tradewind Maritime Co., S.A.
 Transalpine Finance Holdings S.A.
 Transalpine Oelleitung in Oesterreich
 Gessellschaft m.b.H.
 Trans-Arabian Pipe Line Company
 Turkish Petroleum Company Limited
 Twifo Oil Palm Plantations Ltd.
 UBAGUnterflur Betankungsanlage Flughafen Zurich
 United Kingdom Oil Pipelines Limited
 W.A.G. Pipeline Pty. Ltd.
 Wako Kasei Kabushiki Kaisha
 Wakohjushi Kabushiki Kaisha
 Walton, Gatwick Pipeline Company Limited

Werner Weidemann Mineraloelvertrieb G.m.b.H.
 West London Pipeline & Storage Limited
 West Shore Pipe Line Company
 Wilhelm Merti GmbH & Co. KG
 Wiri Oil Services Limited
 Wolverine Pipe Line Company
 WSG, Warmeservice GmbH
 Wymondham Oil Storage Co., Limited
 Zaire Mobil Oil
 Zaire Services Des Entreprises Petrolieres

Petitioner Chevron U.S.A. Inc.'s subsidiaries and affiliates that are not wholly owned are: Atlas Supply Company; Canyon Reef Carriers, Inc.; Dixie Pipeline Company; Explorer Pipeline Company; Felix Oil Company; Kenai Pipe Line Company; Long Beach Oil Development Company; Mid-Valley Pipeline Company; Paloma Pipe Line Company; Pembroke Capital Company, Inc.; Plantation Pipe Line Company; Platte Pipe Line Company; Standard Pacific Gas Line Inc. and West Texas Gulf Pipe Line Company. Its parent is the Chevron Corporation.

Petitioner Tenneco Oil Company's subsidiaries and affiliates that are not wholly owned are: F C Marine, Inc.; Mistal, Inc.; Tenneco Oil Company of Nigeria Unlimited; Collins Pipeline Company; Kern River Gas Supply Corporation; Kern River Service Corporation; Monroe Auto Pecos S.A.; Tenneco Automotive Foreign Sales Corporation Limited; Productora Andina de Acidos y Derivados Ltda; SBG Puerto Rico, Inc.; Alcan Ekco Limited; A/S Hastrup-Ekco Aluminium-Emballage; Ekco S.A.R.L.; Toyo Ekco Company, Ltd.; Skogstre A/S; Etablissement L. Bouilloux S.A.; Poclain S.A.; Poclain Italiana SpA; TENN-USS Chemicals Finance Corporation; Tenngasco Gas Gathering Company; HT Gathering Company; Oasis Pipeline Company; Sara Grete's Cafeteria AB and T & M Terminal Company. Its parent is Tenneco Corporation, which is wholly owned by Tenneco Inc.



FEB 5 1988

JOSEPH F. SPANIOLO
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

KOCH REFINING COMPANY, KOCH FUELS, INC.,
CONOCO INC., MOBIL OIL CORPORATION,
CHEVRON U.S.A. INC., AND TENNECO OIL COMPANY,
Petitioners,
v.

FARMERS UNION CENTRAL EXCHANGE, INC., FARMERS
PETROLEUM COOPERATIVE, INC., FCX, INC., LANDMARK,
INC., LAND O'LAKES, INC., MIDLAND COOPERATIVES,
INCORPORATED, MFA OIL COMPANY, TENNESSEE FARM-
ERS COOPERATIVE, MOORE MCCORMACK PETROLEUM,
INC., GULF STATES OIL & REFINING COMPANY, TEXACO,
INC., and GETTY REFINING AND MARKETING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENTS
FARMERS UNION CENTRAL EXCHANGE, INC.,
FARMERS PETROLEUM COOPERATIVE, INC.,
LANDMARK, INC., LAND O'LAKES, INC.,
MIDLAND COOPERATIVES, INCORPORATED,
MFA OIL COMPANY, AND
TENNESSEE FARMERS COOPERATIVE
IN OPPOSITION

A. BRUCE SCHIMBERG
DAVID M. SCHIFFMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

NATHAN P. EIMER
SIDLEY & AUSTIN
520 Madison Avenue
New York, New York 10022
(212) 418-2100

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Respondents

February 4, 1988

* Counsel of Record

1898

QUESTION PRESENTED

Whether the court of appeals correctly held that, as a matter of state law, the trustee in bankruptcy was permitted to bring a claim to hold the owners of the corporate debtor liable for breach of fiduciary duty and thereby to pierce the corporate veil, pursuant to the trustee's obligation under 11 U.S.C. § 541 to recover all "property" of the estate.

RULE 28.1 DISCLOSURE

The listing, pursuant to Supreme Court Rule 28.1, of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of these respondents is contained in the appendix to this brief.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1141

KOCH REFINING COMPANY, KOCH FUELS, INC.,
CONOCO INC., MOBIL OIL CORPORATION,
CHEVRON U.S.A. INC., AND TENNECO OIL COMPANY,
Petitioners,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., FARMERS
PETROLEUM COOPERATIVE, INC., FCX, INC., LANDMARK,
INC., LAND O'LAKES, INC., MIDLAND COOPERATIVES,
INCORPORATED, MFA OIL COMPANY, TENNESSEE FARM-
ERS COOPERATIVE, MOORE MCCORMACK PETROLEUM,
INC., GULF STATES OIL & REFINING COMPANY, TEXACO,
INC., and GETTY REFINING AND MARKETING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENTS
FARMERS UNION CENTRAL EXCHANGE, INC.,
FARMERS PETROLEUM COOPERATIVE, INC.,
LANDMARK, INC., LAND O'LAKES, INC.,
MIDLAND COOPERATIVES, INCORPORATED,
MFA OIL COMPANY, AND
TENNESSEE FARMERS COOPERATIVE
IN OPPOSITION

Farmers Union Central Exchange, Inc., Farmers Petroleum Cooperative, Inc., Landmark, Inc., Land O'Lakes, Inc., Midland Cooperatives, Incorporated, MFA Oil Company, and Tennessee Farmers Cooperative ("respondents") hereby oppose the petition for a writ of certiorari filed in this case.

STATEMENT

1. Respondents are agricultural cooperatives that in 1976 formed Energy Cooperative, Inc. ("ECI"), an oil refining company, to ensure a steady supply of petroleum products to their members. Pet. App. A2. Respondents own 100 percent of ECI's stock and are its principal customers. Petitioners are oil refiners, distributors and marketers who sold petroleum products to ECI. *Id.*

In May 1981, ECI filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. Thereafter, ECI, as debtor in possession, filed suit against petitioners to recover alleged preferences under Section 547 of the Bankruptcy Code, 11 U.S.C. § 547; Pet. App. A3. The complaints in the preference litigation alleged that ECI transferred money or property to petitioners on account of antecedent debts within 90 days of bankruptcy and at times when ECI was insolvent. *Id.* If the preference litigation is successful, ECI stands to recover nearly \$50 million allegedly received by petitioners during the relevant period. *Id.*

ECI also has filed a lawsuit against respondents "in an attempt to hold them liable for all of ECI's debts." Pet. App. A2. ECI's suit against respondents alleges that they breached contracts with ECI, that they breached certain fiduciary duties to ECI and that they "should be liable for all of ECI's debts as its 'alter ego' under a 'piercing the corporate veil' theory." *Id.* at A3.¹

¹ In December, 1983, a group of ECI's creditors sought to intervene in the litigation between ECI and respondents to assert the

In May, 1984, ECI converted its Chapter 11 reorganization case to a Chapter 7 liquidation case. A trustee was appointed who is now pursuing both ECI's preference litigation against petitioners and ECI's claims against respondents. Pet. App. A3.

2. In July, 1985, petitioners filed the present action against respondents in the United States District Court for the Northern District of Illinois. Petitioners made essentially the "same" allegations (Pet. App. B2, A3) as those being litigated by the trustee, on behalf of ECI, viz., respondents "manipulat[ed]" and "misuse[d]" ECI and are thereby liable (as ECI's "alter ego") for all of ECI's debts. Pet. App. A21, B3. Petitioners sought a declaratory judgment that

ECI is the "alter ego" of [respondents]; that [respondents] are jointly and severally liable for ECI's debts; that ECI was solvent when it filed its bankruptcy petitions; and that [petitioners] are entitled to recover from [respondents] all amounts that the bankruptcy trustee may recover from [petitioners] as preferences.

Pet. App. A3. Respondents filed a motion to dismiss the complaint on the grounds that the petitioners lacked standing, that the complaint failed to state a claim upon which relief could be granted and that the claim was not ripe for adjudication by petitioners. Pet. App. B2, A3.

The district court dismissed petitioners' complaint. The court noted first that petitioners' claim of standing rested on a "speculative" assertion of injury. The court described petitioners' argument regarding injury as alleging that: (1) if petitioners had not misused ECI's

"alter ego" claim, in their own names and on behalf of all ECI creditors, against respondents and to hold respondents liable for ECI's debts. The district court dismissed this claim on the ground that the claim "properly belongs to and should be prosecuted by the trustee rather than the intervening plaintiffs." *In re Energy Co-op., Inc.*, 58 B.R. 132, 134-135 (N.D. Ill. 1984).

corporate form and treated it as their "alter ego," then (2) ECI would not have become insolvent, and (3) respondents would not have been sued in the bankruptcy preference actions and (4) petitioners would not "face the possibility of becoming creditors of ECI." Pet. App. B3. The district court held, however, that "[s]tatus as a creditor or a potential creditor is not enough to confer standing upon the plaintiffs." *Id.*

In addition, the court observed that petitioners failed to satisfy the prudential element of standing that "requires that a plaintiff be the proper party to assert the particular legal issue." *Id.* (citing *Singleton v. Wulff*, 428 U.S. 106, 112 (1976)). The court determined that "the proper party to bring suit against directors and stockholders of a bankrupt corporation [i.e., respondents] . . . is the trustee of the estate." Pet. App. B3.

3. The court of appeals affirmed both holdings of the district court. Pet. App. A3-A4. The court of appeals concluded that petitioners had not alleged a sufficient injury traceable to the conduct of the respondents to satisfy the requirements of Article III and that, as a prudential matter, petitioners were not the proper proponents of the rights that they had asserted. Pet. App. A3-A4, A28.²

With respect to the Article III standing of petitioners, the court of appeals first held that the allegation of injury in fact based on the pending preference litigation was merely "conjectural." Furthermore, the court noted that "[petitioners] have not shown a direct injury to themselves as a result of challenged conduct of the [respondents]" because "[t]he harm contemplated by the [petitioners] might come from the ECI trustee but not from [respondents]." Pet. App. A30. In sum, the court

² Judge Cudahy concurred in the result, but dissented from the holding that petitioners failed to meet the minimal constitutional requirements for standing. Pet. App. A31-A32.

of appeals held that the present lawsuit was nothing more than an attempt to have the district court issue an "advisory opinion" on the ultimate outcome of the preferential transfer litigation. Pet. App. A30-A31. Because of the lack of injury in fact to petitioners and the absence of any "adverse legal interests" between the parties to the case, the court concluded that petitioners lacked standing. Pet. App. A4, A31.

The court of appeals also addressed at length the district court's holding, under the prudential standing doctrine, that the trustee—and not the petitioners—was the proper party to bring the claim against respondents. The court noted first that under 11 U.S.C. § 541, the trustee may sue to recover the "property" of the estate, including any valid claims against "directors and shareholders of a corporation for breaches of fiduciary duties" that the corporation could bring if it were solvent. Pet. App. A8-A9. Because "[s]tate law determines whether property is an asset of the debtor," (Pet. App. A8, A11, A19) the court of appeals examined the law of Indiana and Illinois³ to determine whether the claim in question—seeking to "pierce the corporate veil" and to hold respondents liable for ECI's debts—is a claim of the estate or whether such a claim belonged exclusively to ECI's creditors. After careful examination of this state law question, the court of appeals concluded that, under governing state law, the claim could properly be brought by the trustee to recover the property of the debtor, ECI. Pet. App. A13-A14. Thus, the court concluded that the district court was correct that the trustee "is the proper party to enforce fiduciary obligations 'for the protection of the entire community of interests in the corporation—

³ The court did not need to decide whether Indiana law or Illinois law applied because it found no material difference between them on this issue. Pet. App. A11.

creditors as well as stockholders.' " Pet. App. A25 (quoting *Pepper v. Litton*, 308 U.S. 295, 307 (1939)).⁴

ARGUMENT

The decision of the court of appeals is a correct application of settled principles of law to the facts of this case. Moreover, the only question of law which petitioners ask this Court to review is actually dictum; the resolution of that issue would have no effect on the judgment below. Finally, resolution of the question presented turns on an interpretation of state law. Accordingly, review by this Court of the judgment of the court of appeals is wholly unwarranted.

1. The opinion below carefully distinguishes the two alternative and entirely independent holdings affirming the district court's dismissal of the petitioners' claim. First, the court held that petitioners lacked Article III standing. Second, the court held that, as a prudential matter, the trustee in bankruptcy had the authority and was the proper party to bring the claim in question against the respondents.

Petitioners seek review in this Court of only one discrete portion of the latter holding of the court of appeals. The question presented by petitioners is whether "the Bankruptcy Code authorize[s] the trustee of a corporate debtor to prosecute an action to pierce the corporate veil" Pet., i.⁵ But, even if petitioners were to pre-

⁴ The court stated that it did not intend to determine conclusively in which capacity (*i.e.*, as a representative of the debtor or creditors) the trustee could bring suit. Pet. App. A13, n.7. That question "depends upon the circumstances of the case." *Id.* Thus, the court expressly limited its holding to the conclusion that the trustee was "not precluded from maintaining an alter ego action under Indiana and Illinois law." *Id.*

⁵ This Court reviews "[o]nly the questions set forth in the petition or fairly included therein" Supreme Court Rule 21.1(a); see *Irvine v. California*, 347 U.S. 128, 129 (1954); *Mazer v. Stein*,

vail on that issue, the judgment below would not be affected. The court of appeals' independent determination that petitioners lacked Article III standing would be wholly unaffected by a reversal on the questions presented in the petition. Moreover, it is plain that the court of appeals' holding concerning petitioners' "injury in fact" is wholly fact-specific and therefore does not warrant review by this Court. This no doubt explains petitioners' decision not to raise that issue in the petition. In short, this case is an inappropriate vehicle for resolving the question presented and, therefore, the petition for certiorari should be denied.⁶

2. The question of whether the trustee has authority to pursue the claim against respondents depends upon a question of state law not worthy of review by this Court. The court of appeals made it clear that the question of whether the "alter ego claim" could be brought by the trustee, under 11 U.S.C. § 541, turned on whether the claim was the "property" of the estate as a matter of state law. Pet. App. A11. The court's decision that the claim belonged to the estate, and thus to the trustee, rested solely on its analysis of the laws of Indiana and Illinois. Pet. App. A11-A14.⁷

347 U.S. 201, 206 n.5 (1954); *Phillips Co. v. Dumas School District*, 361 U.S. 376, 386 n.12 (1960). The question of petitioners' Article III standing is not "fairly included" in the Questions Presented, which relate solely to the authority of the trustee.

⁶ As its opinions have stated many times, this Court sits to review judgments, not simply to correct errors in opinions. See, e.g., *Bowen v. American Hospital Association*, 106 S. Ct. 2101, 2112 n.11 (1986); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); *Williams v. Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827).

⁷ Obviously, this Court will not undertake to review judgments that rest on interpretation of state law. See *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Thus, petitioners' assertion that a "conflict" exists between the courts of appeals on this issue is mistaken. The difference in result in the various courts of appeals merely reflects differences in the state laws at issue. *In re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir.), *cert. denied*, 108 S. Ct. 147 (1987), relied on by petitioners (Pet. 15-16) as demonstrating the most direct conflict, expressly relied on an interpretation of Arkansas law in concluding that a claim to "pierce the corporate veil" does "not become property of the estate under Section 541(a)(1)." 816 F.2d at 1225. Indeed, the court in *Ozark Restaurant* distinguished the decision of the district court below, see note 1, *supra*, as follows:-

some states permit the corporation or its shareholders to assert an alter ego cause of action to pierce the corporate veil, and thus, . . . a bankruptcy trustee would be able to enforce the claim on behalf of the debtor corporation under Sections 541 and 704. . . . Arkansas, however, is not one of those states

816 F.2d at 1226, n.7. In short, petitioners' "conflict" is illusory.⁸

Petitioners also discern a "theoretical split" between the Fifth Circuit which, according to petitioners, held "that an 'alter ego' action is property of the debtor estate . . ." (Pet. 14) and the Seventh Circuit which "finds that an 'alter ego' action is *not* property of the debtor estate by operation of state law . . ." Pet. 15

⁸ The Petition for a Writ of Certiorari in the *Ozark Restaurant* case argued that the case warranted review by this Court because of the same alleged "conflict" in the Circuits that is now being raised by petitioners. See Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *In re Ozark Restaurant Equipment Co., Inc.*, No. 87-71 (July 13, 1987).

(emphasis added).⁹ Petitioners' characterization of the Seventh Circuit's "finding" flatly is contradicted by the language of the opinion which states:

[w]e now find that, under Illinois and Indiana law as well [as Wisconsin law], a bankruptcy trustee can bring an alter ego claim of action. State law permits the alter ego claim to be asserted by the trustee in pursuing all funds available as section 541 property of the estate.

Pet. App. A13-14. The statement by petitioners that the Seventh Circuit relied on "the preemptive effect of the Bankruptcy Code" rather than state law is simply erroneous. In fact, the holding below turns *solely* on an issue of state law. There is no conflict in the circuits which warrants review by this Court.

3. Finally, petitioners assert that the decision below conflicts with this Court's decision in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), which, according to petitioners, held that a trustee in bankruptcy has "no authority to assert claims against third parties on behalf of creditors." Pet. 7. But, this Court's opinion in *Caplin* is considerably narrower than petitioners suggest.

In *Caplin*, this Court held that a bankruptcy trustee could not sue an indenture trustee on behalf of debenture holders—a limited class of creditors—for allowing the debtor to breach its obligations under the indenture agreement. 406 U.S. 420-421. The Court noted two problems with the claim in *Caplin* that are not present here. First, the trustee in *Caplin* was not attempting to collect money for the estate; rather, the trustee was merely seeking a recovery that would be paid directly to a lim-

⁹ The Fifth Circuit case upon which petitioners rely, *In re S.I. Acquisition, Inc.*, held that, under Texas law, "a corporation may pierce its own corporate veil and hold accountable those who have misused the corporation" 817 F.2d 1142, 1152 (5th Cir. 1987).

ited class of creditors.¹⁰ The ECI trustee, by contrast, is suing to recover money for the estate, which would be distributed to all creditors. Second, the trustee in *Caplin* was not arguing that the third party had breached any duty owed to the estate; rather, he was complaining that the third party had breached its duty to the debenture holders. In the instant case, the trustee is seeking to recover based on alleged breaches of duties owed to the corporation—a matter which is clearly within the scope of the trustee's authority. See *Pepper v. Litton*, 308 U.S. 295, 307 (1939) (“fiduciary obligation . . . is, in the event of bankruptcy of the corporation, enforceable by the trustee”).

Thus, the decision in *Caplin* prevents a bankruptcy trustee from pressing claims against third parties on behalf of a limited class of creditors, where those claims are personal to the class of creditors. There is no conflict between *Caplin* and the instant case, where the trustee is pursuing a claim against third parties on behalf of the debtor corporation, where the claim belongs to the estate itself, and where the claim, if successful, will benefit all of the creditors of the debtor corporation.¹¹

¹⁰ It was argued that any money recovered would eventually inure to the benefit of the estate because it would reduce the claims of one class of creditors, the debenture holders. However, this Court pointed out that such was not the case because in the event the trustee recovered money from the indenture trustee on behalf of the debenture holders, the indenture trustee likely would be entitled to be subrogated to the claims of the debenture holders against the estate. 406 U.S. at 430-31. Thus, such an action—unlike the claim in question here—would result in no ultimate benefit to the estate.

¹¹ Petitioners' “due process” claim is without merit. It presumes that petitioners, as *potential* creditors of the debtor corporation, are entitled to “representation” in the trustee's litigation to ensure collection of all available assets of the debtor corporation. Petitioners cite no authority for this novel proposition and none exists.

In fact, it is difficult to discern the basis for petitioners' contention that they have been deprived of “property.” The claim in ques-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

A. BRUCE SCHIMBERG
DAVID M. SCHIFFMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

NATHAN P. EIMER
SIDLEY & AUSTIN
520 Madison Avenue
New York, New York 10022
(212) 418-2100

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Respondents

* Counsel of Record

February 4, 1988

tion involves the property of the estate, and not the petitioners. Moreover, there is no "conflict" between the trustee filing a claim against a third party and the petitioners' "interest" in that claim because any recovery by the trustee would work to the benefit of all creditors, including petitioners (if, in fact, they become creditors). As the court of appeals explained, if petitioners become creditors, they will then have available all of the rights of creditors under the Bankruptcy Code. Pet. App. A26, n.14. Thus, if and when the petitioners have "property" interests at stake, they will have more than adequate procedural protections available to satisfy the Due Process Clause. In the meantime, their claim is unripe and they lack standing to assert it.

APPENDIX

APPENDIX

BEST AVAILABLE

APPENDIX

Pursuant to Supreme Court Rule 28.1, these respondents hereby submit the following list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each respondent. For purposes of this listing, the term "affiliate" is defined broadly, and some of the companies listed herein may or may not be regarded as affiliates under particular statutes or definitions.

Farmers Union Central Exchange, Inc.

CENEX Agri-Fuels, Co.
CENEX/Land O'Lakes Agronomy Company
Insurance Acquisition Corporation
National Cooperative Refinery Association
CF Industries, Inc.
Universal Cooperatives, Inc.
Soil Teq, Inc.
Green Bay Terminal Corporation
St. Paul Bank for Cooperatives
Ag Agency, Inc.
CENEX Foundation
CENEX/Land O'Lakes Ag Services Joint Venture

Farmers Petroleum Cooperative, Inc.

Michigan Farm Bureau
Farmers Crude Production Co.
Michigan Farm Bureau Group Purchasing, Inc.
Michigan Agricultural Cooperative Marketing
Association, Inc.
Corporate Services, Inc.
Farm Bureau Life Insurance Company of Michigan
Farm Bureau Mutual Insurance Company of
Michigan
Farm Bureau General Insurance Company of
Michigan

FB Annuity Company
Farm Bureau Marketing Corporation of Michigan
Community Service Acceptance Company

Landmark, Inc.

Countrysmark, Incorporated
Mid States Terminals, Inc.
Farmers Commodities Service, Inc.

Land O'Lakes, Inc.

Ag Processing, Inc.
CF Industries, Inc.
Cooperative Research Farm
Farm Credit Banks of Omaha
Farm Credit Leasing Services Corporation
Farm Credit Services, St. Paul
Imperial Packaging Company
Mid America Farmlines
Mississippi Chemical
Mutual Service Inc.
National Cooperative Refinery Association
Tradevest Incorporated
Universal Cooperatives, Inc.
CENEX/Land O'Lakes Agronomy Company

Midland Cooperatives, Incorporated

On January 1, 1982, Midland Cooperatives, Inc. was merged into Land O'Lakes, Inc. See the above Rule 28.1 listing for Land O'Lakes, Inc.

MFA Oil Company

National Cooperative Refinery Association
Imperial Incorporated

Tennessee Farmers Cooperative

CF Industries, Inc.
Cooperative Seeds, Inc.
Red Panther Chemical Co.
Universal Cooperatives, Inc.
FFR Cooperative
Louisville Bank for Cooperatives
American Institute of Cooperation
National Council of Farmers Cooperatives
Tennessee Council of Cooperatives

No. 87-1141

Supreme Court, U.S.

FILED

FEB 20 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KOCH REFINING COMPANY, KOCH FUELS, INC.,
CONOCO INC., MOBIL OIL CORPORATION,
CHEVRON U.S.A. INC., and TENNECO OIL COMPANY,

Petitioners,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., FARMERS
PETROLEUM COOPERATIVE, INC., FCX, INC., LANDMARK,
INC., LAND O'LAKES, INC., MIDLAND COOPERATIVES,
INCORPORATED, MFA OIL COMPANY, TENNESSEE FARMERS
COOPERATIVE, MOORE McCORMACK PETROLEUM, INC.,
GULF STATES OIL & REFINING COMPANY, TEXACO INC.,
and GETTY REFINING AND MARKETING COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

R.R. McMAHAN
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0328

*Counsel of Record
for Petitioners*

LOUIS W. LEVIT
RICHARD J. MASON
LEVIT AND MASON, LTD.
135 South LaSalle Street
Suite 1525
Chicago, Illinois 60603

Of Counsel

MICHAEL R. HASSAN
JONI L. GOLDSTEIN
TIMOTHY M. MAGGIO
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

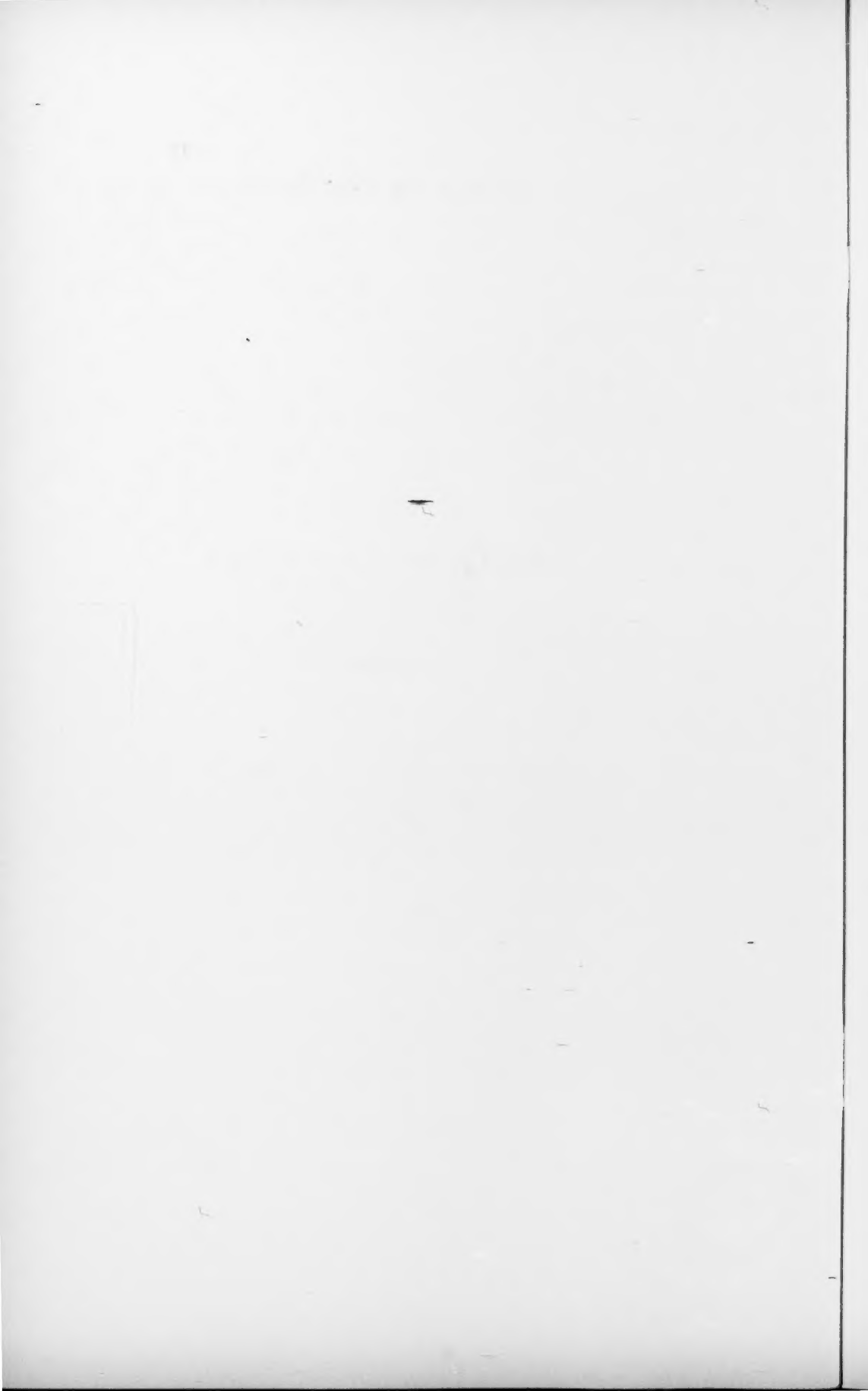
Of Counsel

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IN THE
Supreme Court of the United States

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KOCH REFINING COMPANY, KOCH FUELS, INC.,
CONOCO INC., MOBIL OIL CORPORATION,
CHEVRON U.S.A. INC., and TENNECO OIL COMPANY,

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FARMERS UNION CENTRAL EXCHANGE, INC.,
FARMERS PETROLEUM COOPERATIVE, INC.,
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MIDLAND COOPERATIVES, INCORPORATED, MFA OIL
COMPANY, TENNESSEE FARMERS COOPERATIVE,
MOORE McCORMACK PETROLEUM, INC., GULF
STATES OIL & REFINING COMPANY, TEXACO INC.,
and GETTY REFINING AND MARKETING COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

ARGUMENT

1. Member-Owner Respondents' arguments in opposition to the petition are erected upon a distorted statement of the decision below: They incorrectly describe the question before the Court of Appeals as whether a trustee in bankruptcy is ". . . permitted to bring a claim to hold the owners of a corporate debtor liable for breach of fidu-

ciary duty and *thereby* to pierce the corporate veil . . .” (Resp. i) (emphasis added). An action against the owners of a corporation for breach of the fiduciary duties they owed the *corporation* has nothing to do with the concept of “piercing the corporate veil” at issue in the courts below.

The gist of an alter ego claim is that the corporation’s principals have operated it as a sham and thereby breached their duty to *creditors*. The only issue in this case is whether a bankruptcy trustee can prosecute such an action on behalf of creditors.

2. Nor is it true that the decision below turned on principles of state law. It was irrelevant to the Court of Appeals decision whether, under state law, an alter ego action belonged to the corporation or to creditors. In fact, the Court specifically noted that it did not have to decide that question. (App. A-13 n.7) The Court held that as a matter of *federal* bankruptcy law the Trustee is empowered to assert such a claim on behalf of creditors. (App. A-14) Judge Cudahy succinctly summarizes the holding in his opinion concurring in part and dissenting in part:

. . . The essential theoretical question is whether ECI could ever have maintained an action against its member-owners on the ground that ECI was the alter ego of the owners. Apparently, ECI could not have carried on such an action:

The doctrine of alter ego does not create assets for or in the corporation. It simply fastens liability upon the individual who uses the corporation merely as an instrumentality in the conduct of his own personal business. The liability springs from fraud. The fraud from which it arises is not perpetrated upon the corporation, but upon third persons dealing with the corporation.

Garvin v. Matthews, 193 Wash. 152, 156-57, 74 P.2d 990, 992 (1938) (citations omitted). *Without dealing*

directly with this problem of theory, the majority has concluded that the trustee, in marshalling ECI's assets, may maintain an alter ego action against the member-owners.

Despite the rather basic conceptual problems, policy considerations favoring vesting the action in the trustee encourage a sufficiently broad construction of section 541 to empower the trustee to bring an alter ego action. (App. A-31-32) (Emphasis added)

In short, state law has no bearing whatsoever on the proper construction of Sections 541 or 544, which is exclusively a matter of federal law.

3. Finally, it is simply not true that Petitioners seek review of only one aspect of the Court of Appeals' decision. Member-Owner Respondents characterize the opinion of the Court of Appeals as resting on two entirely independent and self sufficient grounds: one of which it characterizes as springing from principles of ripeness or "Article III standing", and the other as springing from the concept of "prudential standing."

However, the District Court did *not* decide in this case that Petitioners "lacked Article III standing" to maintain their declaratory judgment action against the Member-Owner Respondents. The District Court opined that:

"Status as a creditor or potential creditor is not enough to confer standing upon the plaintiffs. Contrary to the plaintiffs' assertion, standing requires more than a showing of actual or threatened injury. The doctrine of standing also requires that a plaintiff be the proper party to assert the particular legal issue." (App. B-3).

Thus, the District Court disposed of the case purely by deciding that only the trustee and no one else has the legal capacity to assert an alter ego claim, an issue that the Court of Appeals discussed as one of "prudential standing."

In simple terms, the Court of Appeals held that the controversy was not sufficiently adverse or ripe to support a declaratory action (a question the District Court did not decide). It then affirmed the ruling of the District Court on the alter ego question even though that issue was deemed not ripe for ruling. Not only are these rulings not independent they are irreconcilable.

If this petition is denied, the District Court's and Court of Appeals' findings on who is the proper party to bring an alter ego claim will remain intact even though the Court of Appeals has found this very issue not ripe for consideration. The findings below that Petitioners may not assert an action to pierce the corporate veil of ECI because the Trustee of ECI alone has the capacity to do so, will be the law of this case and bar Petitioners from prosecuting such a claim no matter how ripe the controversy may become in the future.

If this Court agrees with the Member-Owner Respondents' contention that the lack of Article III standing was an independent ground of decision which does not warrant review by this Court, the proper disposition is not to deny this petition, but to grant it, to summarily vacate the decisions of the District Court and the Court of Appeals on the "alter ego" question, with directions to dismiss Petitioners' declaratory judgment action without prejudice because the controversy between the Petitioners and the Trustee in the preference action has not yet ripened sufficiently.

The decision of the Court of Appeals now stands as precedent for the proposition that a bankruptcy trustee has the exclusive right to prosecute an action to pierce the corporate veil of the debtor whose estate he represents. Indeed, the Trustee and the Member-Owner Respondents themselves fully appreciate that the Court of Ap-

peals below has decided important and unsettled questions concerning the Trustee's authority to prosecute (and prevent others from prosecuting) alter ego actions. On January 28, 1988 ECI's Trustee and the Member-Owners filed a joint motion in the ECI bankruptcy proceeding for approval of a settlement between them under the terms of which the Trustee would dismiss with prejudice his alter ego claim against the Member-Owners. That settlement proposal is conditioned upon the District Court issuing a permanent injunction against Petitioners and all other creditors and contingent creditors of ECI from filing an alter ego action against the Member-Owners. The Trustee and the District Court could not, of course, afford the Member-Owners such protection if the interpretation of the Bankruptcy Code urged by Petitioners here is correct, and, significantly the settlement proposal pending in the District Court is expressly conditioned on this Court's denial of certiorari in this case.

Thus, a writ of certiorari should issue to the Court of Appeals to review its judgment in this case.

Respectfully submitted,

R.R. McMAHAN
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0328

*Counsel of Record
for Petitioners*

**LOUIS W. LEVIT
RICHARD J. MASON
LEVIT AND MASON, LTD.**
135 South LaSalle Street
Suite 1525
Chicago, Illinois 60603
Of Counsel

**MICHAEL R. HASSAN
JONI L. GOLDSTEIN
TIMOTHY M. MAGGIO
LORD, BISSELL & BROOK**
115 South LaSalle Street
Chicago, Illinois 60603
Of Counsel